The Law of Trusts

THE RULES AGAINST PERPETUITIES AND EXCESSIVE ACCUMULATIONS

A Consultation Paper

CONSULTATION

LAW COMMISSION
CONSULTATION PAPER No 133

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The Law Commission

Consultation Paper No. 133

The Law of Trusts

The Rules against Perpetuities and Excessive Accumulations

A Consultation Paper

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CONTENTS

		Paragraph	*Page*
PART I:	**INTRODUCTION**	1.1	1
Arrangement of this paper		1.17	5
PART II:	**THE PRESENT LAW OF THE RULE AGAINST PERPETUITIES**	2.1	6
Statement of the rule against perpetuities		2.1	6
Certainty of prediction at common law		2.8	7
Wait and see under the 1964 Act		2.13	9
Perpetuity periods at common law		2.16	10
Perpetuity periods under the 1964 Act		2.17	11
(a)	*Fixed period of years not exceeding 80 years*	2.18	12
(b)	*Any life or lives in being listed in the Perpetuities and Accumulations Act 1964, s.3(5) plus 21 years and any period of gestation*	2.20	12
Lives in being at common law		2.21	13
Lives in being under the 1964 Act		2.25	14
Class gifts at common law		2.28	16
Class gifts under the 1964 Act		2.31	17
Reduction of age under the Law of Property Act 1925		2.35	18
Reduction of age under the 1964 Act		2.36	19
Gifts dependent on prior void gifts at common law		2.38	20
Gifts dependent on prior void gifts under the 1964 Act		2.39	21
Determinable and conditional interests at common law		2.40	21
Determinable and conditional interests under the 1964 Act		2.43	22
Powers at common law		2.46	23
Administrative powers at common law		2.47	23
Dispositive powers at common law		2.48	24
Powers under the 1964 Act		2.51	25
Administrative powers under the 1964 Act		2.51	25
Dispositive powers under the 1964 Act		2.52	25
Proprietary interests at common law		2.55	27
Proprietary interests under the 1964 Act		2.59	29
Exceptions to the rule against perpetuities		2.63	30
(a)	*Law of Property Act 1925, s.162*	2.63	30
(b)	*Charities*	2.64	31
(c)	*Pension schemes*	2.67	32
(d)	*Limitations after entails*	2.70	34
(e)	*Forfeiture of leases and enforcement of rentcharges*	2.71	34
	(i) FORFEITURE OF LEASES	2.71	34
	(ii) ENFORCEMENT OF RENTCHARGES	2.72	34

		Paragraph	Page
(f)	*Mortgages*	2.73	35
(g)	*Joint tenancies*	2.74	35
(h)	*Interests in foreign property*	2.75	35
PART III:	**THE PRESENT LAW OF THE RULE AGAINST EXCESSIVE ACCUMULATIONS**	3.1	36
Statement of the rule		3.1	36
Meaning of "accumulation"		3.2	36
Directions to which the statutory provisions apply		3.9	39
Implied trusts		3.10	39
Powers to accumulate		3.11	40
The statutory accumulation periods		3.12	40
(a)	*The life of the grantor or settlor*	3.13	40
(b)	*A term of twenty-one years from the death of the grantor, settlor or testator*	3.14	41
(c)	*The duration of the minority or respective minorities of any person or persons living or en ventre sa mère at the death of the grantor, settlor or testator*	3.15	41
(d)	*The duration of the minority or respective minorities only of any person or persons who under the limitation of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated*	3.16	41
(e)	*A term of twenty-one years from the date of the making of the disposition*	3.18	42
(f)	*The duration of the minority or respective minorities of any person or persons in being at that date*	3.19	43
Choice of period		3.20	43
Excessive accumulations		3.22	44
Surplus income		3.24	44
Saunders v. Vautier		3.26	45
Exceptions to the rule against excessive accumulations		3.28	46
(a)	*Payment of debts*	3.28	46
(b)	*Portions*	3.29	46
(c)	*Timber or wood*	3.30	47
(d)	*Law of Property Act 1925, s.165*	3.31	47
(e)	*Pension schemes*	3.32	48
(f)	*Certain commercial contracts*	3.34	48
PART IV:	**CRITICISMS OF THE PRESENT LAW**	4.1	50
A.	THE RULE AGAINST PERPETUITIES	4.2	50
(a)	Complexity	4.3	50
(i)	*Interaction of common law and the 1964 Act*	4.4	50
(ii)	*Existence of three perpetuity periods*	4.6	51
(iii)	*The 1964 Act and other statutory provisions*	4.8	52
(b)	Uncertainty	4.9	52
(c)	Inconsistency	4.11	54
(d)	Interference with commercial contracts	4.13	54
(e)	Harshness	4.15	55

		Paragraph	Page
(f)	Lack of adaptability	4.16	55
(g)	Expense	4.18	56
B.	THE RULE AGAINST EXCESSIVE ACCUMULATIONS	4.20	56
(a)	Complexity	4.21	57
(b)	Uncertainty	4.25	58
(c)	Inconsistency	4.29	59
(d)	Frustrating the reasonable wishes of settlors and testators	4.31	59
(e)	Applying to charitable trusts	4.35	60
(f)	Not fitting well with other statutory provisions	4.36	61
PART V:	**OPTIONS FOR REFORMING THE RULE AGAINST PERPETUITIES**	5.1	62
Introduction		5.1	62
Retrospectivity		5.3	62
OPTION 1:	TO DO NOTHING	5.8	64
OPTION 2:	ABOLITION OF THE RULE	5.11	65
(a)	Functions of the rule against perpetuities	5.12	65
	(i) Curtailment of "Dead Hand Control"	5.13	65
	(ii) Ensuring the alienability of property	5.15	66
(b)	The case for abolition of the rule	5.17	66
No need for a rule against perpetuities		5.18	66
Performance of functions by other rules of law		5.23	68
	(i) STATUTORY POWERS OF SALE	5.24	68
	(ii) TAX LEGISLATION	5.26	69
	(iii) VARIATION OF TRUSTS	5.27	70
	(iv) THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975	5.30	72
Freedom of disposition		5.31	72
Simplification		5.32	72
Avoidance of the rule		5.33	72
Abolition of the rule in Manitoba		5.34	73
(c)	The case against abolition	5.35	73
Need for the law to curtail "dead hand control"		5.36	73
Limits to attainment of the policies by other rules		5.39	75
	(i) STATUTORY POWERS OF SALE	5.40	75
	(ii) TAX PROVISIONS	5.41	75
	(iii) POWERS TO VARY TRUSTS	5.42	75
	(iv) FAMILY PROVISION LEGISLATION	5.43	76
European Convention on Human Rights		5.44	76
Smooth operation of rule in practice		5.45	76
(d)	Summary	5.46	76
OPTION 3:	REPLACEMENT OF THE RULE AGAINST PERPETUITIES WITH A NEW RULE	5.49	77
(a)	A duration rule	5.50	77
(b)	Extended powers for the court to vary trusts	5.56	79

		Paragraph	Page
OPTION 4:	REFORMING THE RULE AGAINST PERPETUITIES	5.57	79
Introduction		5.57	79
(a)	Removing the need under the 1964 Act to apply the common law before wait and see	5.58	80
(b)	Make a fixed period of years the only perpetuity period	5.65	81
(c)	Introduce a cy-près system	5.69	83
(i)	*When should cy-près be available?*	5.71	83
(ii)	*Determining the intention of the disponor*	5.73	84
(iii)	*Standing to make an application*	5.75	84
(iv)	*Extent of jurisdiction*	5.76	85
(d)	Make provision for advances in reproductive technology	5.79	85
(e)	Create new exceptions to the rule against perpetuities	5.80	86
(i)	*Exclusion of specific types of dispositions*	5.81	86
(1)	PENSION SCHEMES	5.81	86
(2)	FUTURE EASEMENTS	5.83	86
(3)	OPTIONS AND CONTRACTS	5.84	87
(4)	RIGHTS OF PRE-EMPTION	5.86	88
(5)	CONTINGENT DISPOSITIONS TO CHARITY	5.87	88
(ii)	*Exclusion of all commercial dispositions*	5.88	88
Provisional conclusion		5.91	89
PART VI:	**OPTIONS FOR REFORMING THE RULE AGAINST EXCESSIVE ACCUMULATIONS**	6.1	90
Introduction		6.1	90
Should abolition or reform be retrospective?		6.2	90
OPTION 1: TO DO NOTHING		6.3	90
OPTION 2: ABOLITION OF THE RULE		6.4	90
(a)	The case for abolition	6.5	90
(i)	*No need to restrict accumulations*	6.5	90
(ii)	*Other rules of law operating to restrict accumulations*	6.7	91
(1)	THE RULE AGAINST PERPETUITIES	6.7	91
(2)	TAX LEGISLATION	6.10	92
(3)	FAMILY PROVISION LEGISLATION	6.12	92
(4)	THE VARIATION OF TRUSTS ACT 1958	6.13	93
(iii)	*Avoidance measures*	6.14	93
(iv)	*The position in other jurisdictions*	6.16	93
(b)	The case against abolition	6.17	94
(i)	*Continuing relevance of the rule's functions*	6.17	94
(ii)	*Need for the rule against excessive accumulations to ensure that the functions are performed*	6.21	95
OPTION 3: REFORM OF THE RULE		6.22	96
(a)	Change the accumulation periods	6.23	96
(b)	Codify all the relevant law in one statute	6.27	97
(c)	Reform the exceptions to the rule	6.28	98
(d)	Extend the "wait and see" provisions of the 1964 Act	6.31	98
(e)	Other matters	6.32	99
Provisional conclusion		6.34	99

		Paragraph	*Page*
PART VII:	**SUMMARY OF ISSUES**	7.1	100
A.	THE RULE AGAINST PERPETUITIES	7.2	100
B.	THE RULE AGAINST EXCESSIVE ACCUMULATIONS	7.10	102
APPENDIX:	**LIST OF SOLICITORS' FIRMS WHO SUBMITTED RESPONSES TO A QUESTIONNAIRE DISTRIBUTED IN 1991**		104

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PART I

INTRODUCTION

1.1 In this Paper we consider possible changes to legal rules which place restrictions on the ways in which owners may give away their property, whether during their lifetime or by will, on terms which give a number of people limited interests.[1] The rules effectively limit the period during which property can be held in trust, and restrict how far into the future it is possible to benefit recipients.

1.2 In our Fourth Programme of Law Reform[2] we identified this aspect of the law of trusts as one now in need of examination:[3]

> *Perpetuity rule*. Carefully thought out dispositions of property run the risk of being declared wholly or partially invalid, e.g. *Re Drummond*,[4] *Re Green's Will Trusts*,[5] because through technicalities they infringe the rule against perpetuities. We wish to examine the policy behind the rule, and also the policy on accumulations, to see whether in modern conditions they can any longer be justified, and if so, whether they could be simplified and brought up to date (particular account being taken of any difficulties experienced with the operation of the Perpetuities and Accumulations Act 1964).

1.3 In proposing this topic for law reform, the Commission had in mind that in Scotland the law of trusts has no rule corresponding to the rule against perpetuities, and that in a number of common law jurisdictions the rule against perpetuities has been abolished or its abolition has been recommended. Similarly, other common law jurisdictions have no rule against excessive accumulations, or have one which is less restrictive.

1.4 For centuries the owner of property, real or personal, wishing to make a disposition of it either in his lifetime or on his death and to dictate how the property should thereafter devolve, has been restricted by a number of rules of public policy developed by the Courts. Some of those rules[6] became obsolete with, or were abolished by, the fundamental reforms of 1925. Two rules survive. One, the rule against inalienability, sometimes called the rule

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1 In a typical case, a parent may give property to a son or daughter for their life, on terms that after their death it is divided between the grandchildren. Such a gift made during the donor's lifetime would establish a settlement or trust.

2 (1989) Law Com. No. 185.

3 Item 8(b).

4 [1988] 1 W.L.R. 234.

5 [1985] 3 All E.R. 455; para. 2.18 below.

6 The rules governing contingent remainders and executory interests, and the rule against double possibilities (known as the rule in *Whitby* v. *Mitchell* (1890) 44 Ch. D. 85).

against perpetual trusts,[7] is not the subject of this Paper. The other is the rule against perpetuities, with which this Paper is primarily concerned. It sets limits on the period within which interests created by a disposition must vest. Until 1964, this rule was little affected by statute.

1.5 The rule against perpetuities has the effect of limiting the period for which trusts creating a succession of interests in the same property can continue. The way in which it does so is to make a disposition void to the extent that it creates, or in some cases that it may create, an interest which will not vest in its owner within a specified time limit. Although, following statutory reform, that time limit will sometimes be a definite period from the creation of the trust, it may also be 21 years after the death of a person, or the last of a group of people, connected with the trust. This skeletal summary demonstrates the rule's potential for complexity.

1.6 We may illustrate the effects of the rule , which some may see as capricious - while leaving the explanations until later - in this way. Assume that a young parent makes a will leaving property to his baby daughter for her lifetime. He directs that, after her death, it should go to any widower she leaves for his lifetime, and should then be divided between the testator's surviving grandchildren.

(a) If the daughter still had no children when her father died, and that was before 16 July 1964, the gift in favour of the grandchildren does not take effect.

(b) Had the circumstances been the same, except that the death of the testator occurred on or after 16 July 1964, the validity of the gift to the grandchildren might only be decided much later, possibly when the daughter died or perhaps when the widower died.

(c) If the testator's daughter died before he did, having had children, the gift to the grandchildren would be effective.

(d) But if it was the daughter's husband who died before her father, and she survived, the question whether the gift in favour of her children was valid could not be decided until she died, or perhaps until the death of any new husband she might marry.

1.7 This paper also examines a further rule, the rule against excessive accumulations. This statutory rule prevents the accumulation of income under a disposition for a period longer than a period permitted by statute. This further restriction on the ability of disponors to control how the subject matter of their dispositions should be dealt with was first

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[7] These are non-charitable purpose trusts requiring the retention of the trust property either in perpetuity or for a period longer than that permitted by the rule against perpetuities, e.g. an indefinite trust of property for the maintenance of a tomb (*Rickard* v. *Robson* (1862) 31 Beav. 244). The rule against inalienability may deserve examination by the Commission in the future.

introduced in 1800[8] and the statutory provisions (as amended in 1892[9]) were re-enacted with amendments in 1925.[10]

1.8 By 1954 the rule against perpetuities had been elaborated by the Courts in a way that left the law governing the rule in a dauntingly complex state. This rule, as well as the rule against inalienability and the rule against excessive accumulations, was the subject of a reference to the Law Reform Committee. In November 1956 that Committee[11] reported[12] and its recommendations for reform were for the most part enacted in the Perpetuities and Accumulations Act 1964 ("the 1964 Act"). The provisions of the 1964 Act applied only to dispositions taking effect after that Act came into force on 16 July 1964. The reforms "proceeded as usual by building on the old law",[13] which requires a continuing knowledge of both the old and the new rules which considerably reduces the effect of simplification. The Committee took to be "beyond argument" the necessity for placing some time limit on the vesting of future interests.[14]

1.9 From one perspective, the 1964 Act did not simplify the law. Rather it added to the complexity. It left in place the rules which then applied, for dispositions which took effect before the Act came into force. The new rules were clearly an improvement, but they had no retrospective effect. Even now, some thirty years later, the old rules still apply to many trusts, although it is impossible to know how many. One of the major reasons for the difficulties in this area of the law, with the trouble and expense that they entail, is the difficulty of ready comprehension. That process is not assisted by having two sets of rules in parallel.

1.10 The aim of this Paper is to define the effect which these two rules currently have, to consider what is now the appropriate role, if any for each to play and to canvass views on how their aims might be best fulfilled. It will be necessary for us to set out, in some detail, the existing legal rules and to examine possible alternatives. However, we recognise that the

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8 Accumulations Act 1800 (39 and 40 Geo. 3, c.98), normally known as the Thellusson Act, as being the sequel to *Thellusson* v. *Woodford* (1799) 4 Ves. Jun 227, (1805) 11 Ves. Jun 112. In that case the Court held to be valid the direction of a testator, Thellusson, that the income of his property was to be accumulated at compound interest during the lives of his sons, grandsons and great-grandchildren living at his death, the accumulated fund to be divided among certain of his descendants on the death of the survivor. "Parliament intervened to prevent other testators or settlors afflicting their successors with compulsory hoarding upon this scale" (Megarry and Wade, *The Law of Real Property* (5th ed., 1984), p.301).

9 Accumulations Act 1892.

10 Law of Property Act 1925, ss. 164-166.

11 Comprising Jenkins and Parker L.JJ., Devlin and Diplock JJ., Professors A.L. Goodhart, Hughes Parry and E.C.S. Wade, Mr. R.F.J. Burrows, Mr. Gerald Gardiner Q.C., Mr. J.N. Gray Q.C., Mr. R.E. Megarry Q.C. and Mr. R.T. Outen.

12 L.R.C. Fourth Report, Cmnd. 18.

13 Megarry & Wade, op. cit., p.241.

14 Law Reform Committee Fourth Report (1956) Cmnd. 18, para. 4.

questions raised are not exclusively legal ones. Changes in this area could have social and economic consequences, and we would welcome comments on the wider non-legal consequences of possible changes in the law.

1.11 We think that it will be helpful if, at the outset, we summarise briefly the policy questions which need to be considered when weighing up the possibility of reform. We shall return to these points in detail later in the Paper, but we give an advance outline to serve as a background to our detailed exposition of the legal rules.

1.12 The fundamental justification for the rule against perpetuities is that it restricts the ability of a property owner to "reach out from beyond the grave" to control the actions of his successors in title, by preventing them from freely disposing of the property. Social conditions and economic needs change, and nobody can guarantee to foresee what will be appropriate in the future. Restricting the free alienability of property therefore serves to prevent dispositions on a limited basis stretching far into the future, which could prove to be against everyone's best interests. Further, free alienability is likely to ensure better land use,[15] through the operation of market forces. They should generally have the effect that the person able to use land most productively will acquire it, because its greater value in his hands will allow him to pay a price for it which will tempt the current owner to sell.

1.13 On the other hand, property ownership normally includes a free right to obtain or dispose of the property, or to dispose of it on terms. There is a view that any limitation applied to, and detracting from, that right requires full justification if it is to survive. The aim of ensuring that property is fully used in a beneficial manner is now facilitated or encouraged by other legislation: trustees can always dispose of land[16] and fiscal legislation discourages the tying up of estates for generations. The complexity of this area of the law will be manifest when reading our exposition of it, and the simplification which abolishing the rule would achieve is one argument for that course.

1.14 The rule against excessive accumulations prevents anyone taking a beneficial interests in the fund during the accumulation period. This can be seen as preventing the money being put to good use during that period. However, the money will be invested, and is not therefore lost to the general economy. Here again, tax legislation is likely to discourage any over-lengthy accumulations, and it is to be questioned whether there is justification for restricting an owner's free right to dispose of his fortune as he wishes.

1.15 We were greatly assisted in the preliminary work on the preparation of this paper by Mr David Gwynn Morgan, Statutory Lecturer in Law at the University of Cork, to whom we should like to express our thanks.

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[15] Although, as we have stated, the rule against perpetuities applies to gifts of all forms of property, it has probably been considered most frequently in relation to land. That is, no doubt, both because land is the only permanent form of tangible asset, and because traditionally well endowed families have been concerned to preserve intact the landed estates which they have owned for many years, and have employed settlements to achieve their purpose.

[16] The proceeds being held on trust for the beneficiaries, and being available for re-investment. The court has jurisdiction to extend trustees' investment powers where appropriate: Variation of Trusts Act 1958 and Trustee Act 1925,s.57: see paras. 5.27 and 5.28 below.

1.16 With a view to elucidating what practical problems were being experienced by practitioners in relation to the rules against perpetuities and excessive accumulations, in 1991 we consulted a number of solicitors' firms known to practise extensively in the law of trusts. A list of the firms who responded is contained in the Appendix. We are very grateful to them for the valuable help which they gave us.

Arrangement of this paper

1.17 Parts II and III respectively contain an examination of the present law relating to the rule against perpetuities and the rule against excessive accumulations. Part IV contains criticisms of the two rules. In Part V we consider the options for reforming the rule against perpetuities and in Part VI we consider the options for reforming the rule against excessive accumulations. In Part VII we summarise our provisional recommendations and other points on which we invite comments.

PART II

THE PRESENT LAW OF THE RULE AGAINST PERPETUITIES

Statement of the rule against perpetuities

2.1 The rule against perpetuities is a rule directed against remoteness of vesting, not against undue duration of trusts. The common law rule has been conveniently summarised in the form of two propositions:

> "(i) Any future interest in any property, real or personal, is void from the outset if it may possibly vest after the perpetuity period has expired.
>
> (ii) The perpetuity period consists of any life or lives in being together with a further period of 21 years and any period of gestation".[1]

2.2 The 1964 Act modified the rule in relation to instruments[2] taking effect on or after 16 July 1964 (other than instruments made in exercise of a special power of appointment created under an instrument taking effect before that date) in two ways:

> (a) The future interest, instead of being void because of the possibility that it may vest outside the perpetuity period, is treated as not subject to the rule against perpetuities until such time, if any, as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period.[3]
>
> (b) The perpetuity period may, as an alternative to the period in paragraph (ii), be a fixed period, not exceeding 80 years, specified in the instrument.[4]

2.3 Because the 1964 Act is not retrospective in effect[5] (save only for a provision in respect of administrative powers of trustees), the unamended common law rule against perpetuities continues to apply to those instruments which were executed before the commencement of the 1964 Act and which are still in force. Further, because the modification indicated in paragraph 2.2(a) only applies if the interest would, but for the modification, be void for perpetuity, it is necessary to apply the common law rule first to see if that condition is satisfied. In the following discussion it is therefore necessary to distinguish carefully between the rule at common law and the amended rule.

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1 Megarry and Wade, *The Law of Real Property* (5th ed., 1984), pp.241-2.

2 Although reference is made in the 1964 Act to instruments, by s. 15(6) the Act is to apply to oral dispositions (e.g. an oral declaration of trust) as if such disposition had been contained in an instrument taking effect when the disposition was made.

3 The 1964 Act, s.3(1).

4 *Ibid.*, s.1(1).

5 *Ibid.*, s.15(5).

2.4 An interest may be contingent (i.e. depending on some future event) or vested and if vested may be vested in possession, giving the right of present enjoyment, or vested in interest, giving a right to future enjoyment (e.g. the interest of B in A's lifetime under a gift to A for life, remainder to B). For the purposes of the rule against perpetuities vesting in possession is irrelevant. What the common law rule requires is that the interest should not be capable of vesting in interest outside the perpetuity period. The amended rule requires that the interest should not in fact vest in interest outside that period.

2.5 The ordinary requirements of the law of trusts for the vesting in interest of an interest are that: (a) the person entitled is ascertained; and (b) any condition precedent to the interest is satisfied. For the rule against perpetuities there is a further requirement: (c) the size of the benefit must be known. This means that either the exact amount or, where there is a gift to a class, the fraction of the property to be taken must be known. This is, no doubt, a reflection of the fact that the size of the interest of each member of a class is contingent on the ascertainment of the exact number of persons taking in that class; if the determination of that number may occur outside the perpetuity period, the gift will be void at common law.

2.6 We do not propose to set out in this paper the detailed rules and fine distinctions that have been developed by the Courts to distinguish between contingent and vested interests. Although that development, in the course of which the Courts adopted the policy of favouring early vesting, may have been influenced by a desire to avoid the consequences of a future interest falling foul of the rule against perpetuities, the rules and distinctions are part of the general law of trusts and so outside the scope of this project.[6]

2.7 The rule against perpetuities is not confined to interests created under wills or settlements. It applies to every type of proprietary interest. For example, the grant of a right to use sewers and drains under the grantor's land which were not in existence at the time of the conveyance, was held to be a grant of an easement to arise at an uncertain date in the future which was not limited to take effect within the perpetuity period, and was therefore void.[7] But because the rule is confined to the vesting of interests, the rule does not apply to restrictive covenants, whether affecting freehold or leasehold land, because no interest vests on a future breach of such a covenant.

Certainty of prediction at common law

2.8 The common law rule against perpetuities is applied by turning the clock to the time when the instrument creating a future interest took effect[8] and asking if it is then certain that the interest must vest, if at all, within the perpetuity period. It does not matter that the interest might never vest at all. For example, a gift 'to the first child of X' may never vest at all because X may never have a child; but it is certain that if the gift vests it will do so within the perpetuity period and there is no breach of the rule. If there is any possibility of vesting occurring outside this period the interest is void for perpetuity. The fact that it may

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[6] For a fuller discussion see, for example, *Theobald on Wills* (15th ed., 1993), Ch. 43.

[7] *Dunn* v. *Blackdown Properties Ltd.* [1961] Ch. 433.

[8] A will takes effect at the date of the testator's death. Inter vivos settlements generally take effect on the date when they are made: *Halsbury's Laws of England* (4th ed., 1981), vol. 35, para. 964.

be extremely unlikely is immaterial. A clause which limits vesting to the perpetuity period will validate a gift which would otherwise be too remote, but such limitation must be reasonably explicit. In *Portman* v. *Viscount Portman*[9] a stipulation that vesting should be postponed only "so far as the rules of law and equity will permit" was held to be insufficient to validate a void gift, but in *Re Vaux*[10] the words "within the limitations prescribed by law" were sufficient.

2.9 One consequence of achieving certainty of prediction is that, with two exceptions,[11] what happens between the time when the interest takes effect and the time when the validity of the interest is being considered is ignored. Even if events have occurred which would have caused the interest (if valid) to vest, they are still ignored. Fictional possibility is preferred to reality. This aspect of the rule has attracted considerable criticism.[12] It is a trap for the unwary draftsman that far-fetched possibilities or even physical impossibilities (for example, that a child may be born to a woman throughout her life) may be relevant to drafting a provision containing a contingent interest. The consequences have been held up to ridicule for ignoring reality.[13] Thus the rule has struck down a disposition because of the possibility that children might be born to a husband and wife both aged 70.[14]

2.10 Another example of the consequences of applying the common law rule, known as the 'unborn widow' situation, is found in *Re Frost*.[15] A father purported to give property by will to his unmarried daughter for life, remainder to any husband she may marry for life and then remainder to all of the daughter's children alive at the date of death of the survivor of his daughter and her husband. The gift to the children was contingent on their being alive at the death of their parents. Looking at the situation from the date of the testator's death, his daughter might marry someone who was then unborn. That husband could survive the daughter by at least twenty one years. It was therefore possible that the gift to the children

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9 [1922] 2 A.C. 473.

10 [1939] Ch. 465, where *Portman* v. *Viscount Portman supra* was not cited.

11 See paras. 2.11 and 2.50 below.

12 Fourth Report of the Law Reform Committee (1956), Cmnd. 18, para. 11.

13 *Exham* v. *Beamish* [1939] I.R. 336. See W. Barton Leach, "Perpetuities in a Nutshell" (1938) 51 Harv. L.R. 638 at pp. 642-646, and "Perpetuities: The Nutshell Revisited" (1965) 78 Harv. L.R. 972 at pp. 978-980. Professor Leach describes the various types of cases as those of the fertile octogenarian, the unborn widow, the administrative contingency and the precocious toddler. His criticisms of the common law based on the need to consider these "fantastic possibilities" are challenged by Ruth L. Deech, "Lives in Being Revived" (1981) 97 L.Q.R. 593, at pp.608-9.

14 *Jee* v. *Audley* (1787) 1 Cox 324, applied by the House of Lords in *Ward* v. *Van Der Loeff* [1924] A.C. 653. For the purposes of the rule against perpetuities, at common law people are treated as being capable of having children for as long as they live. Legal impossibilities are, however, taken into account: see *Re Gaite's Will Trusts* [1949] 1 All E.R. 459. Section 2 of the 1964 Act has removed this fiction for the purpose of determining the validity of dispositions to which the Act applies: see n.19 to para. 2.13 below.

15 (1889) 43 Ch. 246.

would not vest until more than twenty one years after the daughter's death and so it was void for perpetuity.

2.11 One of the exceptions to the principle of certainty of prediction arises in the case of alternative contingencies.[16] These arise when a gift or other disposition is to take effect on the happening of one of two or more events. It can be difficult to determine whether a gift actually expresses two alternative events and some of the cases on the matter have made fine distinctions between forms of wording of various gifts.[17] If one of the contingencies is void for perpetuity and the other is not, it is possible to wait and see if the latter actually occurs first within the perpetuity period. In the event of this happening, the gift will be valid.

2.12 An example of this "waiting and seeing" at common law occurred in *Re Curryer's Will Trusts*.[18] A testator directed that funds should be held on trust for his grandchildren living at the period of distribution on the decease of his last surviving child or on the death of the last surviving widow or widower of his children whichever should last happen. A gift to grandchildren living on the death of the testator's last surviving child would not be void for perpetuity at common law. However a gift to grandchildren living on the death of the last surviving widow or widower of his children would infringe the rule. It was decided that the testator had expressed the two events (i.e. the death of his last surviving child or the death of the last surviving widow of his children) separately and there were therefore two alternative contingencies. The gift to grandchildren was not void ab initio and would be valid if the death of the testator's last surviving child happened after the death of the last surviving widow or widower of his children.

Wait and see under the 1964 Act

2.13 Where a contingent interest arising from a disposition made on or after 16th July 1964 would be void for perpetuity at common law because it might vest outside the perpetuity period,[19] s.3(1) of the 1964 Act makes it possible to wait and see whether the interest actually vests within the perpetuity period.[20] The Act treats the interest as valid during the period of waiting and seeing. It is only void if it does not, in fact, vest within the period, or if it becomes apparent that it cannot possibly vest within the period. An interest which

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16 The other exception arises in the case of special powers of appointment: on these see para. 2.50 below.

17 Illustrations of distinctions between cases are given in Morris and Leach, *The Rule against Perpetuities* (2nd ed (1962) p.182. At p.183 it is suggested that there is a tendency in cases to find that contingencies have been sufficiently separated in order to save the gifts from being void for perpetuity. It is essential that the gift expresses the events separately: *Miles* v. *Harford* (1879) 12 Ch. D. 691, 703.

18 [1938] Ch. 952.

19 Where the application of the rule against perpetuities involves a question which turns on the ability of a person to have a child at some future time, in relation to dispositions made on or after 16 July 1964 it is appropriate to invoke s.2 of the 1964 Act prior to the "wait and see" provisions. This section contains two presumptions; first that a male can have a child at the age of fourteen or over; and, secondly, that a female can have a child at the age of twelve years or over but not over the age of 55.

20 If there is no possibility of it vesting within the perpetuity period, "wait and see" does not apply.

does vest during the perpetuity period is valid. Similarly, the Act[21] makes it possible to wait and see whether or not a power, option or other right is actually exercised within the perpetuity period before it is rendered void. During the period of "waiting and seeing" the trustees can, for example, where appropriate, advance capital and pay or apply intermediate income to or for the benefit of a beneficiary entitled to the interest. The validity of these actions is not affected if it is subsequently established that the interest is void for perpetuity.[22]

2.14 Had the 1964 Act applied to *Re Frost*,[23] it would have been possible to wait and see whether the daughter married a husband who was born before the father's death or, if she married someone unborn at that death, whether he died within 21 years of her death. In either event the interest of the children living at the death of the survivor of the daughter and her husband would have been valid. Even if neither event occurred, s.5 of the 1964 Act would have saved the children's interest by treating it as vesting immediately before the end of the period of 21 years after the daughter's death.[24]

2.15 Statutory "wait and see" may also be of assistance where there are alternative contingencies, at least in relation to the contingency which is void for perpetuity at common law.[25] If the 1964 Act had applied in *Re Curryer's Will Trusts*[26] it would have been possible to "wait and see" if the death of the last surviving widow of the testator's children actually happened within the perpetuity period, and if this occurred prior to the death of the last surviving child, the gift would be valid.[27]

Perpetuity periods at common law

2.16 The perpetuity period at common law is a life or lives in being plus 21 years and any period of gestation.[28] A child en ventre sa mère[29] at the beginning of the perpetuity period

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21 S. 3(2), (3) of the 1964 Act.

22 *Ibid*; s.3(1).

23 (1889) 43 Ch. 246. See para. 2.10 above.

24 S.4 of the 1964 Act contains further provisions which may save a disposition from being void for perpetuity where the wait and see provisions do not do so: see paras. 2.33-2.34 and 2.36-2.37 below. S.3(1) of the Act provides that ss. 4 and 5 should be applied after the "wait and see" provisions. As far as the age reduction rules are concerned, the 1964 Act follows the view of the minority of the members of the Law Reform Committee: see the Fourth Report of the Law Reform Committee (1956), Cmnd. 18, note by Mr Burrows and Dr Morris.

25 *Halsbury's Laws of England (4th ed., 1981)*, vol.35, para. 984.

26 [1938] Ch. 952. See para. 2.12 above.

27 If the "wait and see" provisions do not save the contingency, it is arguable that s.5 of the 1964 Act could be used: see para. 2.14 above and Megarry and Wade, op. cit., p.275.

28 For a discussion of lives in being at common law see paras. 2.21-2.24 below.

is treated as a life in being. Where a pregnancy occurs during the period, the period is extended so far as is necessary to include the gestation period.[30] For example if there is a disposition to the first child of A to attain 21, it satisfies the rule even if A's only child was unborn both at the date of the disposition and even at A's death, the perpetuity period being the life of A plus the gestation period plus 21 years.[31] These extensions of the period only apply where gestation actually occurs and the date of the subsequent birth affects the period chosen.[32] Where there are no lives in being relevant to the disposition the period is 21 years.[33]

Perpetuity periods under the 1964 Act

2.17 The 1964 Act contains express provisions about perpetuity periods.

(a) Section 1(1) of the Act allows the perpetuity period to be a fixed period not exceeding 80 years. This only applies in relation to instruments taking effect on or after 16 July 1964.[34] The perpetuity period remains 21 years where there are no lives in being and no specific period of up to 80 years is specified.

(b) Section 9(2) of the Act lays down a perpetuity period of 21 years for dispositions conferring options to acquire for valuable consideration any interest in land.

(c) The 1964 Act defines the lives in being that are to be used for the purpose of its "wait and see" provisions, so the perpetuity period may be a statutory life or lives in being plus twenty-one years and any period of gestation.

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29 "In simple English it is an unborn child inside the mother's womb": *Royal College of Nursing* v. *Department of Health and Social Security* [1981] A.C. 800, 802, per Lord Denning M.R.

30 The development of the technology to cryopreserve gametes and embryos has made it possible for a child to be born after the death of one or both genetic parents. This could create perpetuities problems: e.g. if a man's sperm is cryopreserved and used more than 21 years after his death, then if the resulting offspring were to be regarded in law as his child, any class gift to his children or grandchildren would, at common law, be void for perpetuity. This particular type of potential difficulty is solved by status provisions contained in the Human Fertilisation and Embryology Act 1990. Section 28(6)(b) provides that where a man's sperm, or an embryo created using his sperm, is used after his death, he is not posthumously to be treated as the father of any resulting child, despite the genetic link. In relation to eggs, s.27(1) ensures that the carrying mother will always legally be treated as the child's mother, which ensures that the problem identified above will not arise. For discussion of other perpetuities problems which may result from advances in reproductive technologies, see n.45 and para. 5.79 below.

31 See Megarry and Wade, op. cit., pp.259-60.

32 *Cadell* v. *Palmer* (1833) 1 Cl. & F. 372, 421-2.

33 See *Re Hooper* [1932] 1 Ch. 38.

34 S.15(5) of the 1964 Act.

(a) Fixed period of years not exceeding 80 years

2.18 The power to specify a fixed perpetuity period was included in the Act as a result of the Law Reform Committee's recommendation that it should be available as an alternative to the period of a life or lives in being plus 21 years.[35] A fixed period must be specified in the instrument by which the disposition is made.[36] This is limited in two ways. First, it does not apply to the exercise of a special power of appointment, unless a fixed perpetuity period is specified in the instrument creating the power.[37] When it is, it applies to the appointment made under the power as well as in relation to the power itself. Secondly, the fixed period option of up to 80 years does not apply in the case of "a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land".[38]

2.19 A disposition by an instrument prescribing a fixed perpetuity period, but which is not limited so that it is bound to vest within that period is void under the common law rule requiring certainty of vesting within the perpetuity period.[39] But it will be saved by s.3(1) of the 1964 Act until such time, if any, as it becomes established that the vesting must occur after the end of the period.[40]

(b) Any life or lives in being listed in the Perpetuities and Accumulations Act 1964 s.3(5) plus 21 years and any period of gestation

2.20 This period may apply where: (i) the common law rule against perpetuities renders the interest void;[41] (ii) a fixed perpetuity period has not been specified in accordance with

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35 Fourth Report (1956), Cmnd. 18, para. 9.

36 The 1964 Act, s.1(1). This requirement may not be interpreted too strictly where to do so would clearly defeat the disponor's intentions. In *Re Green's Will Trusts* [1985] 3 All E.R. 455, Nourse J. decided that s.1 applied to a provision in a codicil stating that the perpetuity period applicable to the trusts created by the will was the period of years from the date of the testator's death to 1st January 2020.

37 The 1964 Act, s.1(2).

38 *Ibid.*, s.9(2).

39 This would apply, e.g., to a disposition, for which a period of 80 years is specified as the perpetuity period, to the first son of A to marry.

40 In several textbooks it is suggested that the applicable period for "waiting and seeing" in cases such as in the example given is the period prescribed by s.3(4) of the 1964 Act and measured by statutory lives in being: see Cheshire and Burn, *Modern Law of Real Property* (14th ed., 1988) p.301; Maudsley, *The Modern Law of Perpetuities* (1979) pp. 114, 123-4 and Megarry and Wade, op. cit., p.253. But an alternative view is that by reason of the words in s.3(4), "Where....the duration of the perpetuity period is not determined by section 1...", those provisions are inapplicable and that accordingly in the example given it would be necessary to wait and see if a son of A married within the period of 80 years until such time (if any) as it becomes established that the vesting must occur after that period. That might entail waiting throughout that period. The inapplicability of a period measured by statutory lives in such an example is consistent with s.1(1) which provides that when a period of years is specified as the perpetuity period, the perpetuity period is the specified period instead of being of any other duration.

41 The 1964 Act, s.3(1).

s.1 and the disposition does not confer an option relating to land;[42] and (iii) the "wait and see" provisions of the 1964 Act are being used.[43] The persons who may be statutory lives in being in relation to a disposition are set out in s.3(5) of the Act.[44]

Lives in being at common law

2.21 Any person living or en ventre sa mère[45] at the time when the disposition takes effect may be used as a life in being for the purposes of the common law rule. An animal is not a life in being[46] nor is an artificial person such as a company.

2.22 However, not every life in being will be a relevant life for those purposes. The definition of such relevant lives has occasioned academic controversy. One theory is that a relevant life is one that validates a gift, so that when a gift fails no life can be found.[47] But this has been criticised as being tautologous and as unsupported by the decided cases.[48] The more commonly held view is that a relevant life is one which can govern the time when a gift is to vest.[49] Such a life will be mentioned in the gift either expressly or by implication. For example, where a testator gives property to his grandchildren at 21 the lives of his children (although not expressly mentioned) may be taken to be relevant lives governing the time when the gift to their children will vest. But the mere fact that a person is mentioned in a gift does not necessarily mean that that person is a relevant life. Thus the grant by a grantor to a grantee of an easement to use drains "hereafter to pass" under the grantor's land is void for perpetuity.[50] Neither the grantor's nor the grantee's life governs when the drains will be built.

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42 *Ibid.*, s.3(4).

43 *Ibid.*, s.3(1)-(3).

44 See para. 2.26 below.

45 The newly-developed ability to cryopreserve embryos may cause perpetuity problems here, in that an interest granted to the resulting child may vest outside the common law perpetuity period, unless the embryo itself is regarded as a life in being even before implantation *in utero*. *Halsbury's Laws of England* (4th ed., 1981), vol. 35, para. 926, suggests that the courts may, on grounds of public policy, be prepared to regard a child born by the process of in vitro fertilisation as a life in being from the moment of fertilisation. However, this solution could extend the perpetuity period considerably, and might therefore be thought to be unsatisfactory in terms of policy. See further para. 5.79 below.

46 See *Re Kelly* [1932] I.R. 255 at pp.260-1, per Meredith J. A contrary view was adopted in *Re Dean* (1889) 41 Ch. 552, but it is regarded as being wrongly decided: see *Halsbury's Laws of England* (4th ed., 1981), vol. 35, para. 914 n.6.

47 See, for example, Maudsley, op.cit. pp. 94-100.

48 Deech, (1981) 97 L.Q.R. 593, 605.

49 See, for example, Morris and Leach, op. cit. p.62; Megarry and Wade, op. cit. pp. 250-251.

50 *Dunn* v. *Blackdown Properties Ltd.* [1961] Ch. 433.

2.23 Since 1833 it has been clear that a relevant life in being need not be a beneficiary or a person related to a beneficiary: a disponor may choose any life or lives in being.[51] The desire of many settlors and testators to postpone vesting for the longest possible period led to the use of arbitrarily selected lives such as those of members of the royal family.[52] Thus a common royal lives clause has required the vesting of capital in a trust before the expiration of 21 years from the death of all the issue, living at the date when the instrument takes effect, of His late Majesty King George V. Before the 1964 Act made it possible to specify a period of up to 80 years as the perpetuity period it was common for a royal lives clause to be used. Since the 1964 Act, some use continues to be made of royal lives clauses by those who believe that thereby a perpetuity period longer than 80 years will be obtained.

2.24 But whilst there is no restriction on the number of relevant lives in being, it must be reasonably practical to ascertain who they are. As Lord Eldon said in *Thellusson* v. *Woodford*, "[t]he language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that to which testimony can be applied to determine when the survivor of them drops".[53] In *Re Villar*,[54] where a testator directed that capital was not to vest until the end of a period expiring 20 years from the death of the lineal descendants of Her late Majesty Queen Victoria, the Court of Appeal held that the difficulties of discovering when the survivor of 120 or 130 persons died were not insurmountable and that the trust was not void for uncertainty or perpetuity. But a trust which was to last "for the longest period allowed by law, that is to say, until the period of twenty one years from the death of the last survivor of all persons who shall be living at my death" was held void for uncertainty.[55]

Lives in being under the 1964 Act

2.25 For the purposes of the "wait and see" rule, the 1964 Act lays down which lives in being are relevant in relation to certain dispositions. The disposition must be one to which the 1964 Act applies but for which a fixed period has not been specified in accordance with s.1 nor which is subject to s.9(2) (options relating to land).[56] Further, the disposition must be one which, apart from (i) the "wait and see" provisions of s.3; (ii) s.4 (reduction of age and exclusion of class members to avoid remoteness); and (iii) s.5 (saving of a remote disposition containing a condition relating to the death of a surviving spouse), would be void on any of three grounds. The grounds are: (a) the interest disposed of might not become vested until too remote a time;[57] (b) a general power of appointment conferred by a

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51 *Cadell* v. *Palmer* (1833) 1 Cl. & F. 372.

52 Because the facts concerning births and deaths of members of the royal family are easily ascertainable; but see para. 4.6 below.

53 (1805) 11 Ves. Jun. 112 at p.146.

54 [1929] 1 Ch. 243.

55 *Re Moore* [1901] 1 Ch. 936.

56 See para 2.60 below.

57 S.3(1) of the 1964 Act.

disposition might not become exercisable until too remote a time;[58] and (c) any power, option or other right given by the disposition might be exercised at too remote a time.[59] In these cases, the perpetuity period to be applied is a life or lives in being listed in s.3(5) of the 1964 Act plus 21 years and any period of gestation. A life in being must be a person alive and ascertainable at the commencement of the perpetuity period.

2.26 The persons who are lives in being vary in accordance with the type of disposition in question. The following chart, derived from s.3(5) of the 1964 Act, summarises the list:

	TYPE OF DISPOSITION	PERSONS WHO ARE LIVES IN BEING
(i)	All dispositions.	The person by whom the disposition was made.
(ii)	Dispositions to a class of persons.	Any member or potential member of the class.
(iii)	Disposition to a person taking only on certain conditions being satisfied.	Any person who satisfies some of the conditions and may satisfy the remainder in time.
(iv)	Special power of appointment exercisable in favour of members of a class.	Any member or potential member of the class.
(v)	Special power of appointment exercisable in favour of one person only.	The person in whose favour the power is exercisable.
(vi)	Special power of appointment where the object of the power is ascertainable only on certain conditions being satisfied.	Any person who satisfies some of the conditions and who may satisfy the remainder in time.
(vii)	Power, option or other right.	The person on whom the right is conferred.
(viii)	Disposition limited to take effect on the failure or determination of a prior interest.	The person who has a prior interest.

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[58] S.3(2) of the 1964 Act.

[59] S.3(3) of the 1964 Act.

2.27 A person having a child or grandchild falling within column 2 paragraphs (ii) - (vi) or any of whose children or grandchildren, if subsequently born, would by virtue of his descent fall within those paragraphs is also a life in being. If the number of these persons or those falling within column 2 (ii) - (viii) of the chart is such as to render it impractical to ascertain the date of death of the survivor then their lives are to be disregarded.[60] Where there is no available life in being, the perpetuity period for the purposes of the "wait and see" rule is 21 years.

Class gifts at common law

2.28 In *Pearks* v. *Moseley*, Lord Selborne L.C. defined a class gift as a gift "to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares...".[61] The shares do not have to be equal: a gift to the children of A at 21 but so that daughters take shares twice the size of those of sons is a class gift. But it is not a class gift where the property is given in shares which are not variable with the number of takers. Thus a gift of property to be divided equally between the five daughters of A gives each a one fifth share of that property.[62] It is a question of construction whether, for example, a gift to A and the children of B at 21, is a gift of one half to A and a class gift to B's children or a class gift to a class consisting of A and the children of B.[63] It is also a question of construction whether a disposition contains more than one separate class gift. Take, for example, a gift to A for life, subject thereto to A's widow for life, remainder in equal shares to A's children with a proviso that if any child dies in the lifetime of A or his widow (if any), leaving children living at the death of the survivor of A or his widow (if any), they (the children) shall take their parents' share. The gift to the children of A has been construed as a class gift separate from the class gift to the children of each dead child.[64]

2.29 A class of beneficiaries to whom a gift is made may be closed by the operation of the class-closing rules, commonly known as the rule in *Andrews* v. *Partington*.[65] The rule operates so as to facilitate early distribution. Thus in a gift to the children of A, at 21, the class of beneficiaries will close as soon as any child of A attains 21, to the exclusion of any child thereafter born to A. Where there is a life interest prior to such a gift, the class will not close before the death of the life tenant, as no child of A can obtain an interest in

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[60] S.3(4)(a) of the 1964 Act. This provision was applied by Goff J. in *Re Thomas Meadows and Co. Ltd and Subsidiary Companies (1960) Staff Pension Scheme Rules* [1971] Ch. 278.

[61] (1880) 5 App. Cas. 714, 723.

[62] *Re Smith's Trusts* (1878) 9 Ch. D. 117.

[63] Compare *Porter* v. *Fox* (1834) 6 Sim. 485 with *Re Harper* [1914] 1 Ch. 70.

[64] Cf. *Goodier* v. *Johnson* (1881) 18 Ch. D. 441.

[65] (1791) 3 Bro. C.C. 401.

possession prior to that death.[66] But the rule is one of construction only and will be displaced by a sufficient expression of a contrary intention.[67]

2.30 The rule against perpetuities applies to class gifts in a distinctive, and at times harsh,[68] way: if, at the time the instrument by which a disposition to a class is made takes effect, it is possible that any member of the class could take outside the perpetuity period, the gift to the whole class will fail, notwithstanding that other members of the class may already have satisfied or would satisfy any specified contingency within that period. As Lord Selborne said in *Pearks* v. *Moseley*:[69] "...the rule is that the vice of remoteness affects the class as a whole, if it may affect an unascertainable number of its members". A class gift is not severable; hence the importance of ascertaining whether what might appear to be a single gift is not two class gifts with the result that even though the second may be void for perpetuity the first may be valid.[70]

Class gifts under the 1964 Act

2.31 There are three ways in which the 1964 Act can validate a disposition to a class of persons which is void for perpetuity at common law.

2.32 First, where it is uncertain whether the gifts to each member of the class will vest within the perpetuity period, the "wait and see" provisions should be invoked. They may save the gift where the interests of all the members of the class actually vest within the period. The class closing rules,[71] which, if applicable, are always applied prior to using the 1964 Act, can be of assistance in applying the "wait and see" provisions in two principal ways. First, they can create a possibility that a class gift will vest within the perpetuity period and can therefore permit "waiting and seeing". Secondly, they can facilitate the vesting of the gift within the period because events can occur after the gift comes into operation which close the class.

2.33 When it is apparent at the time the disposition is made or becomes apparent at a subsequent time that the inclusion of any persons, being potential members of the class or

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66 *Re Bleckly* [1951] Ch. 740.

67 See, for example, *Re Tom's Settlement* [1987] 1 W.L.R. 1021.

68 *Pearks* v. *Moseley* (1880) 5 App. Cas. 714, 732 per Lord Blackburn. See also W. Barton Leach, "The Rule against Perpetuities and Gifts to Classes" (1938) 51 Harv. L. Rev. 1329, in which the rule is attacked as being practically and analytically unsound. Leach suggests that there was an error in the leading case of *Leake* v. *Robinson* (1817) 2 Mer. 363 and the cases which have followed it because in those cases the courts failed to recognise that there was a valid interest subject to partial divestment by an invalid gift (*ibid.*, p.1348. See also Morris and Leach, op. cit., pp. 125-131).

69 Supra, at p.723.

70 As in *Goodier* v. *Johnson* (1881) 18 Ch. D. 441.

71 For a detailed analysis of the operation of the "wait and see" provisions and the class closing rules see Peter Sparkes and Richard Snape, "Class Closing and the Wait and See Rule" [1988] Conv. 339. This article suggests at p.343 that some writers erroneously consider that class closing cannot apply during the "wait and see" period.

unborn persons who at birth would become potential members of the class,[72] would cause the disposition to be treated as void for remoteness, then s.4(4) of the 1964 Act provides that they are deemed to be excluded from the class for all purposes unless their exclusion would exhaust the class. This provision, like s.4(3) discussed in the following paragraph, departs from the common law rule that the "vice of remoteness" affects every member of the class. It permits a gift to those members whose interests vest within the perpetuity period to be valid even when the interests of other members are too remote. "Wait and see" will be applied before applying s.4(4).[73]

2.34 When the age reduction rules have been applied,[74] the inclusion within the class of unborn persons who at birth would become members or potential members of the class can stop those rules saving a disposition from being void for remoteness. In such a case, s.4(3) of the 1964 Act deems these persons to be excluded from the class. The section operates when "wait and see", age reduction and s.4(4) of the 1964 Act cannot save the gift.[75]

Reduction of age under the Law of Property Act 1925

2.35 The understandable wish of many disponors to postpone the vesting date when beneficiaries would take substantial sums of capital until they reached an age greater than 21 years led to many gifts being void for perpetuity. The problem was addressed in the Law of Property Act 1925 in relation to instruments executed after 1925 or wills of testators dying after 1925. Section 163 provides that where an interest in property is contingent on a beneficiary attaining an age exceeding 21 years and it would, but for the section, be void for perpetuity, the interest shall take effect as if it was contingent on the beneficiary attaining 21 and the age of 21 is substituted for the specified age. Where there is a class of beneficiaries, the specified age is reduced to 21 for all of them.[76] The section has operated well, presumably saving many interests from being void for perpetuity. The Law Reform Committee said in 1956: "Section 163 appears to have attracted no body of criticism during the thirty years in which it has been in operation".[77]

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[72] By s.15(3) of the 1964 Act a person is treated as a potential member of the class if some only of the conditions identifying a member of the class are satisfied but there is a possibility that the remainder will in time be satisfied.

[73] This is the effect of the opening words of s.3(1) which exclude ss. 4 and 5 (see Megarry and Wade, op. cit., pp. 249, 266).

[74] See paras. 2.36-2.37 below. The "wait and see" rules are applied prior to the age reduction rules.

[75] An example of the type of gift where s.4(3) may be of assistance is given in Morris and Wade, "Perpetuities Reform at Last" [1964] 80 L.Q.R. 486, 511.

[76] The section also applies to save and accelerate gifts over.

[77] Fourth Report (1956) Cmnd 18, para. 27.

Reduction of age under the 1964 Act

2.36 The 1964 Act[78] repealed s.163 but only in relation to instruments taking effect after 15 July 1964.[79] It was replaced by a different age reduction rule in s.4(1) of the 1964 Act, which applies where there is an interest in property contingent on a person or persons attaining an age exceeding 21 years and the interest would but for the section be void for perpetuity but would not be void if the specified age had been 21. The latter provision differs from s.163 in two respects. Instead of substituting the age of 21 years for the age specified in the disposition, s.4(1) provides that the disposition should be treated for all purposes as if the age specified was the "age nearest to that age which would if specified instead, have prevented the disposition from being void for perpetuity." This rule is not restricted to applying to dispositions which are contingent on the beneficiary attaining a specified age; it also applies where the contingency is another person or other persons attaining a specified age. Section 4(2) applies where the disposition specifies different ages, exceeding 21 years, in relation to different persons. Each age is then to be reduced so much as is necessary to save the disposition from being void for remoteness.

2.37 There are two points to be noted. First, although it is clear how s.4(1) of the 1964 Act operates when the disposition is contingent on one person attaining an age exceeding 21,[80] the position is unclear when it is contingent on more than one person attaining that age. For example,[81] in the case of a gift by will to the first of A's children to attain the age of 25 where A has three children aged three, two and one at the testator's death, should the age of 22 be substituted for 25 in relation to all the children? Alternatively, should the age of 25 be reduced on the successive premature deaths of the elder children so that for the age of 24 for the eldest, on his death the age of 23 for the second child is substituted and on his death the age of 22 for the youngest is substituted?[82] The answer is uncertain and we know of no case which clarifies the interpretation of s.4(1) in this situation.[83] Secondly, if appropriate, the "wait and see" provisions should be applied before ss.4(1) and (2) of the 1964 Act.

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78 S.4(6).

79 S.15(5). In relation to the application of the "wait and see" rule, an error in the drafting (see (1976) 120 S.J. 498), which meant that s.4(6) had to be ignored, was corrected by the Children Act 1975, Sch. 3 para. 43, inserting s.4(7).

80 For example, in the case of a gift to the first son of X, a living person, to attain 30, and at X's death his eldest son is 8, he would take at 29 instead of 30: *Hansard* (H.L.) Vol. 256, col. 238.

81 This example is given in Megarry and Wade, op. cit., pp. 268-9.

82 As favoured by Megarry and Wade, op. cit. p. 269.

83 Some academics follow the "once and for all approach" because there is only one disposition involved even although it concerns more than one person. See Morris and Wade, "Perpetuities Reform at Last" (1964) 80 L.Q.R. 486, 509; M.J. Prichard, "Two Petty Perpetuity Puzzles" [1969] C.L.J. 284, 289 and Cheshire and Burn, op. cit., pp.311-312. Others adopt the contrary view primarily because it is closest to the disponor's wishes. See Maudsley, op. cit., pp.142 and 144, and *Halsbury's Laws of England* (4th ed., 1981) vol. 35, para. 972 n.12.

Gifts dependent on prior void gifts at common law

2.38 Where an instrument contains more than one limitation in succession, the perpetuity rule is applied to each separately. But sometimes a limitation which, looked at in isolation, would be valid, will be void at common law because it is dependent upon a prior void gift. The Law Reform Committee said that it was not easy to discover from the cases any precise test for "dependency".[84] In *Re Hubbard's Will Trusts*[85] Buckley J. divided the cases into three categories:

(a) First, where property is disposed of in such a way as to create a series of successive interests, each intended to take effect only upon the exhaustion or termination of all antecedent interests, and one of those interests is void for remoteness, all the subsequent interests are void. Take, for example, a gift by will to the first son of A to become a clergyman, but if A has no son, to B for life; A and B survive the testator. The limitation in favour of A's son is void as the interest may vest outside the perpetuity period. The gift to B must vest, if at all, within B's lifetime; but because the vesting will only occur on the failure of the prior gift, that limitation is also void.[86] The reason for this is that the subsequent dependent trusts were not intended to take effect unless and until the prior trust was exhausted and the invalidity of the prior trust prevents that from happening.[87]

(b) Secondly, an interest which will not take effect in possession until a future date, which must vest in interest within the perpetuity period, and the enjoyment of which in possession is not dependent on the prior exhaustion of the antecedent interests, is not void for perpetuity. For example, where a testator settled a share of residue on trust for A during his life and after his death on trust for any widow of A and any children of A, and after the widow's death for A's children at 21, it was held that the ultimate trust for A's children was valid, notwithstanding the prior invalid trust for A's widow, because it was not dependent upon the void prior trust.[88]

(c) Thirdly, where property is given to beneficiaries subject to their interest being displaced by the exercise of a power or discretion which is invalid for remoteness, the beneficiaries are not affected by that invalidity.[89]

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[84] Fourth Report (1956) Cmnd. 18, para. 32. The rules relating to the validity of dependent limitations have been criticised: see Morris, "Ulterior Limitations and the Rule against Perpetuities" (1950) 10 C.L.J. 392 and Morris and Leach, op. cit., pp. 179-181 and First Supplement (1964).

[85] [1963] Ch. 275, 284-8, followed in *Re Buckton's Settlement Trusts* [1964] Ch. 497.

[86] *Proctor* v. *Bishop of Bath and Wells* (1794) 2 H. Bl. 358.

[87] *Re Abbott* [1893] 1 Ch. 54, 57 per Stirling J.

[88] *Re Coleman* [1936] Ch. 528.

[89] *Re Canning's Will Trusts* [1936] Ch. 309.

Which category a case falls into is a question of construction. The inclusion of several cases within the first category has been criticised for not giving effect to the disponor's wishes or for contravening the principle requiring gifts to be construed as vested wherever possible.[90]

Gifts dependent on prior void gifts under the 1964 Act

2.39 When the 1964 Act applies to a disposition which contains successive limitations, it both saves and accelerates interests which are ulterior to and dependent upon prior interests which are void for remoteness. Section 6 provides:

(a) A disposition is not to be void merely because it is ulterior to and dependent upon an interest under a void disposition. The validity of a limitation is thus judged in isolation, if appropriate after applying the "wait and see" rule. It is not affected by questions of dependency on a prior void interest.

(b) Remoteness is not to prevent the vesting of an interest from being accelerated on the failure of a prior interest simply because remoteness causes that failure. Nevertheless, a contingency applicable to the ulterior gift must still be satisfied.

Determinable and conditional interests at common law

2.40 As the rule against perpetuities was concerned with the vesting of interests and not with their duration, it did not invalidate interests which vested within the perpetuity period but were made subject to divestment at a date which might fall outside that period. Thus the appointment of the income of a fund to a daughter, not alive at the date of the settlement, so long as she was living and unmarried, was valid as the vesting occurred within the perpetuity period.[91] Similarly to convey property in fee simple to trustees during such time and so long as it was used as a library was also valid.[92] If the disposition went on expressly to create a remainder on the termination of the determinable interest, there is no doubt that at common law the remainder would be void for remoteness. But the reverter to the grantor or the resulting trust following the ending of the determinable interest and the invalidity of a subsequent interest would not, it appears, have fallen foul of the rule against perpetuities.[93] In only one case, *Hopper* v. *Corporation of Liverpool*,[94] has it been held that a possibility of reverter was subject to the rule.

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90 See Megarry and Wade, op cit., p.273.

91 *Re Gage* [1898] 1 Ch. 498.

92 *Hopper* v. *Corporation of Liverpool* (1944) 88 S.J. 213.

93 *A-G.* v. *Pyle* (1738) 1 Atk. 435 and *Re Tilbury West Public School Board and Hastie* (1966) 55 D.L.R (2d) 407 (both relating to possibilities of reverter); *Re Cooper's Conveyance Trusts* [1956] 1 W.L.R. 1096 (relating to a resulting trust of land); *Re Chardon* [1928] Ch. 464 (relating to a resulting trust of personalty).

94 (1944) 88 S.J. 213.

2.41 An interest subject to a condition precedent, for example A's interest in a gift to A if he shall attain 21, is the type of interest to which the rule against perpetuities most commonly and obviously applies. The category includes interests of beneficiaries under a discretionary trust. Unless limited to a perpetuity period, the trust is invalid because a beneficiary's right to be paid any sum only arises when the discretion is exercised in his favour.[95]

2.42 An interest subject to a condition subsequent is an interest which is defeated on the later satisfaction of a condition. It bears a close resemblance to a determinable interest, but is distinguished from it by the language of the disposition: where words introduce a separate clause of defeasance such as "provided that" or "on condition that", they take effect as a condition subsequent. A conveyance of the fee simple subject to a condition subsequent operates as the reservation of a right of re-entry. Unless the condition satisfies the rule against perpetuities, it will be void.[96] But this does not affect the validity of the disposition of the fee simple, which becomes absolute, freed from the condition subsequent.[97] The Law of Property Act 1925[98] restricts to within the perpetuity period the exercise of rights of entry on condition broken or for any other reason in regard to an estate in fee simple (other than a legal rentcharge).

Determinable and conditional interests under the 1964 Act

2.43 Dispositions to which the 1964 Act applies and under which there is a possibility of reverter on the determination of a determinable fee simple, or a possibility of a resulting trust on the determination of any other determinable interest in property, are assimilated to dispositions creating interests subject to conditions subsequent. Section 12(1) applies the rule against perpetuities to the provision for determination in the same way as if it were expressed in the form of a condition subsequent, giving rise on its breach to a right of reverter or an equivalent right in the case of personalty. Further, to avoid ownership being left in the air, where the provision for determination falls to be treated as void for remoteness, the determinable interest becomes absolute. Section 12(2) provides that the possibility of reverter or a resulting trust is to be treated as if it were created by a separate disposition. The result is that the perpetuity period applicable to the determinable interest is not measured by reference to the deemed separate disposition. Thus when applying the "wait and see" rule to a gift to a dogs' home so long as it exists with a gift over to A, there are no relevant lives in being in relation to the determinable gift and one waits and sees whether the home ceases to exist within 21 years. If it does, A takes; if it does not, the determinable interest becomes an absolute interest.

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95 *Re Blew* [1906] 1 Ch. 624; *Re Leek* [1967] Ch. 1061.

96 *Re the Trustees of Hollis' Hospital and Hague's Contract* [1899] 2 Ch. 540; *Re Da Costa* [1912] 1 Ch. 337.

97 *Re Da Costa*, supra.

98 S.4(3).

2.44 Only two changes were made by the 1964 Act to dispositions creating conditional interests. First, the "wait and see" rule may save interests which otherwise would be void for remoteness. Secondly, discretionary trusts are treated like powers of appointment.[99]

2.45 Section 12 of the 1964 Act does not specifically refer to statutory rights of reverter. There is some authority that an interest conferred by statute cannot be held invalid on the ground of perpetuity.[100] On this view a statutory right of reverter, or a trust for sale replacing a right of reverter as a result of the Reverter of Sites Act 1987 s.1, could not be void for perpetuity, and therefore s.12 is probably inapplicable to such rights.

Powers at common law

2.46 Powers may be classified for the purposes of the rule against perpetuities as either administrative or dispositive. Administrative powers authorise certain dealings with the subject matter of a disposition without affecting beneficial interests. For example, trustees may be given powers of sale or investment. Dispositive powers authorise dispositions which do affect the beneficial interests. A power of appointment is the most common form of dispositive power. Another is a power of advancement, whether expressly conferred by the trust instrument or by statute.

Administrative powers at common law

2.47 Administrative powers, while not affecting beneficial interests, may nevertheless create or alter property interests and are subject to the rule against perpetuities. Thus a power given to a trustee to grant leases during the lifetime of an unborn person is void,[101] as is a trust (which necessarily includes a power) to sell gravel pits when they were worked out.[102] Powers which are incidental to a beneficial interest need not be expressly limited to a perpetuity period if the beneficial interest is such that the power can only be exercised properly within the period. Thus the administrative powers given to a life tenant who is a life in being will be valid, and in appropriate circumstances the court will construe a power expressed to come into effect on the death of a life in being as exercisable within a reasonable time thereafter and so valid.[103] Some statutory powers are, it appears, assumed to be capable of valid exercise at any time. Thus the statutory powers conferred on tenants for life by the Settled Land Act 1925 can be validly exercised at any time, as can other statutory powers of sale, leasing and management.[104]

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99 S.15(2). See para. 2.52 below.

100 *Re Christchurch Inclosure Act* (1888) 38 Ch. D. 520, 530, per Lindley L.J. See also *Crane* v. *Wallasey Corpn.* (1912) 107 L.T. 150 and *Re Cawston's Conveyance* [1940] Ch. 27 at p.33 per Sir Wilfrid Greene M.R.

101 *Re Allott* [1924] 2 Ch. 498.

102 *Re Wood* [1894] 3 Ch. 381.

103 *Re Lord Sudeley and Baines & Co.* [1894] 1 Ch. 334.

104 See Megarry and Wade, op. cit., p.280.

Dispositive powers at common law

2.48 The application of the rule against perpetuities to dispositive powers and dispositions made pursuant to them varies according to the nature of the power in question. The powers which call for the most frequent consideration in this connection are powers of appointment; but the principles also apply to other dispositive powers such as the trustees' power of advancement, whether conferred by statute or by the trust instrument, and the power of disposition inherent in a discretionary trust. Powers of appointment must, for the purposes of the rule against perpetuities be either general or special. A power is general if the power given to the donee to make an appointment is such as to be equivalent to a vested interest in the property.[105] Thus if the donee is given power to appoint to anyone in the world including himself or even to a more limited class, but including himself, so that he is free to make the property his own,[106] the power is general. By contrast, a power which cannot be exercised by the donee in his own favour (even a power exercisable in favour of anyone in the world other than himself[107]), or only jointly with another[108] or with another's consent,[109] is for perpetuity purposes special. An unrestricted power to appoint by will is treated in a distinct way. As the donee in his lifetime is not free to deal with the property as he chooses, but can only do so on death, the power is a special power for the purposes of determining the validity of the power[110] but a general power for the purposes of determining the validity of an appointment made in exercise of the power.[111]

2.49 To determine whether a general power of appointment is void for perpetuity, one must ask whether it is certain that the donee of the power will acquire the power, if at all, within the perpetuity period. That period will be measured from the time when the instrument creating the power takes effect. The donee of a general power must be ascertainable within the perpetuity period and any condition precedent to the acquisition of the power must be capable of being satisfied, if at all, within the period.[112] As the donee of a general power is treated as an absolute owner of the property subject to the power,[113] it is immaterial for this purpose that the power might be exercised outside the perpetuity period. Further, the validity of the disposition made on exercise of the power is determined in the same way as for any disposition by an absolute owner.

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[105] *Re Earl of Coventry's Indentures* [1974] Ch. 77, 89-90 per Walton J.

[106] Cf. *Re Penrose* [1933] Ch. 793.

[107] *Re Park* [1932] 1 Ch. 580.

[108] *Re Churston Settled Estates* [1954] Ch. 334.

[109] *Re Watts* [1931] 2 Ch. 302.

[110] *Wollaston* v. *King* (1868) 8 Eq. 165; *Morgan* v. *Gronow* (1873) 16 Eq. 1.

[111] *Rous* v. *Jackson* (1885) 29 Ch. D. 521; *Re Flower* (1886) 55 L.J. 200.

[112] *Re Hargreaves* (1890) 43 Ch. D. 401.

[113] See *Re Fane* [1913] 1 Ch. 404, 413 per Buckley L.J.; *Re Churston Settled Estates* [1954] Ch. 334, 344-7 per Roxburgh J.

2.50 The validity of a special power depends on the answers to two questions: first, that posed in the previous paragraph for a general power and, secondly, the further question whether it is certain that the power will be exercisable within the perpetuity period.[114] Again the period commences when the instrument creating the power takes effect. The appointment is treated as if it was contained in the instrument creating the power itself.[115] Nevertheless, facts which have occurred between the date when the instrument creating the power took effect and the date of the appointment made under it can be taken into account in applying the common law rule.[116] Thus where a special power of appointment in favour of the issue of A was given to A, a bachelor, who exercised it by will in favour of his daughters who should survive him and attain 24, it was permissible to take account of the fact that his youngest daughter was more than 3 years old at the time of his death and hence the appointment was valid.[117] This is one case where a form of "wait and see" is permitted at common law.

Powers under the 1964 Act

Administrative powers under the 1964 Act

2.51 The 1964 Act provides that the rule against perpetuities shall not operate to invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property for full consideration, or to do any other act in the administration, as opposed to the distribution, of any property.[118] It also removes the payment of reasonable remuneration for the services of trustees or others from the ambit of the rule. Pursuant to the only recommendation for retrospectivity which the Law Reform Committee made, this applies to powers conferred by an instrument taking effect before 16 July 1964 but exercised on or after that date.[119]

Dispositive powers under the 1964 Act

2.52 The 1964 Act, like the common law, distinguishes between general and special powers of appointment. References to powers of appointment extend to other dispositive powers, such as a power of advancement and the power inherent in a discretionary trust, as any power of appointment includes a discretionary power to transfer a beneficial interest in property

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[114] *Re De Sommery* [1912] 2 Ch. 622. In that case a disposition was construed as conferring on trustees for the time being two special powers of appointment, one valid because it could only be exercised in favour of a life in being and so only exercisable during that person's life and the other in favour of a class of persons not lives in being and not confined in its exercise to the perpetuity period and therefore void.

[115] *Muir (or Williams)* v. *Muir* [1943] A.C. 468, 483, per Lord Romer.

[116] *Wilkinson* v. *Duncan* (1861) 30 Beav. 111.

[117] *Von Brockdorff* v. *Malcolm* (1885) 30 Ch. D. 172.

[118] 1964 Act, s.8(1).

[119] Fourth Report (1956) Cmnd. 18, para. 67; s.8(2) of the 1964 Act.

without the furnishing of valuable consideration.[120] It confirms the common law distinction between general powers and special powers and the distinct position of unrestricted powers to appoint by will.[121] This provision is not retrospective.[122] There is, however, one change. For the purposes of the 1964 Act, the character of the dispositive power is determined from the outset and the Act, unlike the common law, does not permit a change from a special to a general power as circumstances alter. For example where there are two joint donees of an unrestricted power, the death of one will at common law, but not for the purposes of the 1964 Act, make the special power a general power.[123] In the case of an instrument made in exercise of a special power of appointment (and to determine whether a power is a special power of appointment for this purpose the statute is applied whatever the date of the instrument), the Act applies only where the instrument creating the power takes effect after 15 July 1964.[124]

2.53 The conferring of a power of appointment is a disposition for the purposes of the Act.[125] By s.3(2) the "wait and see" rule is applied in relation to the validity of a disposition consisting of the conferring of a general power by an instrument taking effect after 15 July 1964. If the disposition would be void at common law on the ground that the power might not become exercisable until too remote a time, one waits and sees, and in the meantime treats the disposition as valid, until such time, if any, as it becomes established that the power will not be exercisable within the perpetuity period. As at common law, the validity of the exercise of the general power is determined, like that of any other disposition made by the owner of property, at the time of the exercise of the power, but the "wait and see" and other provisions of the 1964 Act may also be applicable to that disposition. When applying the "wait and see" rule to a disposition the perpetuity period for which is determined neither by s.1 nor by s.9(2), the statutory lives in being consist of the donor and the donee of the general power.[126]

2.54 The "wait and see" rule applies to validate for the time being a disposition granting a special power which would, but for sections 3, 4 and 5, be void as being capable of being exercised outside the perpetuity period. Such a disposition is treated as void for remoteness

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[120] The 1964 Act, s.15(2).

[121] *Ibid.*, s.7. See para. 2.48 above.

[122] It has been suggested that the object of s.7 is to resolve any difficulties of classification of powers of appointment in all cases and not just for post-1964 instruments: Wolstenholme and Cherry's Conveyancing Statutes (13th ed., 1972) Vol. 2, p.143. But the wording of s.15(5) of the 1964 Act does not appear to support this and in *Re Earl of Coventry's Indentures* [1974] Ch. 74, at p.84, Walton J. observed: "It appears to me quite clear that section 7 was enacted for the purpose of quieting difficulties for the future, and nothing more".

[123] Morris and Wade, (1964) 80 L.Q.R. 486, 521.

[124] The 1964 Act, s.15(5).

[125] *Ibid.*, s.15(2).

[126] *Ibid.*, ss. 3(4), 3(5)(a) and 3(5)(b)(v).

only if and to the extent that the power is not wholly exercisable within the period.[127] An appointment made under a special power is a disposition for the purposes of the 1964 Act,[128] although not one to which a fixed perpetuity period could apply.[129] Further, the 1964 Act only applies to an appointment made under a special power created by an instrument taking effect after 15 July 1964. The validity of the appointment will be determined in accordance with the common law rule,[130] save that the "wait and see" and other provisions of the 1964 Act may be relevant to the appointment. The statutory lives in being are, in addition to the donor and donee of the power, the objects of the power and certain progenitors of such objects.[131]

Proprietary interests at common law

2.55 At common law the rule had no application to personal contracts creating personal obligations and rights.[132] However, the rule does apply to contracts creating interests in property limited to take effect at some future time. Many contracts create such interests as well as personal obligations and rights, and even if the interests in property are void for remoteness, the personal obligations may be enforceable. In *Hutton* v. *Watling*[133] an action between the original contracting parties for specific performance of an agreement created by the exercise of an option succeeded notwithstanding the defence (on which the Court did not have to rule) that the option provision was void for remoteness. As Jenkins J. said,[134] "specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do." In *Worthing Corporation* v. *Heather*,[135] a claim for specific performance of an agreement following the exercise of an option failed against the successors in title of the grantor but a claim for damages against the grantor's estate succeeded. An assignee of the benefit of a contract can enforce it against the grantor or his estate at any time because the rule does not apply to personal obligations.[136] But the assignment itself may offend the rule unless it takes effect within the perpetuity period.[137]

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[127] *Ibid.*, s.3(3).

[128] *Ibid.*, s.15(2).

[129] I.e. a period applied by the instrument creating the power, not the appointment: *ibid.*, s.1(2).

[130] See para. 2.50 above.

[131] The 1964 Act, ss. 3(5)(b)(iii) and (iv) and 3(5)(c). See paras. 2.26-2.27 above.

[132] *Walsh* v. *Secretary of State for India* (1863) 10 H.L.C. 367.

[133] [1948] Ch. 26, affirmed [1948] Ch. 398.

[134] [1948] Ch. 26, at p.36.

[135] [1906] 2 Ch. 532.

[136] *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers (1900) Ltd.* [1910] 1 Ch. 12.

[137] *Gray on Perpetuities* (4th ed., 1942) para. 329 n.1.

2.56 Whether a contract creates an interest in property depends on the terms of the contract. Contracts to purchase or lease land, if specifically enforceable, create equitable interests and, as estate contracts, they are binding not only on the original promisors but also on their successors in title[138] subject to the operation of the rule against perpetuities which will render interests which may arise outside the perpetuity period void as against persons other than the grantors or their estates. Ordinary contracts for sale are valid even if there is no specific completion date as a term that completion will take place within a reasonable time is implied. But a contract for sale in, say, 22 years' time would probably be void against persons other than the grantor or his estate, "for the purchaser's equitable interest, though it arises at once, cannot be truly vested until the time has expired".[139]

2.57 A common example of an interest in property that will arise in the future under a contract is an option to purchase property. The grant of the option creates an immediate contingent interest in the property which will not become vested until the option is exercised. Unless the period during which the option is exercisable is limited to the perpetuity period, the option will be bad[140] (although it may be enforceable as a personal obligation[141]). By contrast a right of pre-emption, conferring no right for the grantee to call for the transfer of the property unless the grantor chooses to fulfil the conditions on which the right could be exercised, is not an interest in land unless and until the grantor so chooses.[142] It is therefore not subject to the rule against perpetuities, merely creating a personal right, which, provided it does not amount to a condition against alienation,[143] can be enforced as such. Options in leases to purchase the reversion are subject to the same rules, but options for renewal are contained in covenants which run with the land and are altogether exempt from the rule against perpetuities.[144] At common law covenants which made the leases perpetually renewable were also exempt,[145] but since 1925 such leases cannot exist.[146] Further, contracts made after 1925 to renew leases for over 60 years from their termination are void.[147]

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[138] Subject to compliance with registration requirements: Land Registration Act 1925, s.59; Land Charges Act 1972, s.4(6).

[139] See Megarry and Wade, op. cit., p.289, referring to Gray, op. cit., para. 330 n.2.

[140] *London and South Western Railway Co.* v. *Gomm* (1882) 20 Ch. 562.

[141] See para. 2.55 above.

[142] *Pritchard* v. *Briggs* [1980] Ch. 338. A right of pre-emption is, nevertheless, within the statutory definition of an estate contract: Land Charges Act (1884) 1972, s.2(4)(iv).

[143] See, for example, *Re Rosher* (1884) 26 Ch. D. 801.

[144] *Muller* v. *Trafford* [1901] 1 Ch. 54 at p.61.

[145] See, for example, *Rider* v. *Ford* [1923] 1 Ch. 541.

[146] Law of Property Act 1922, s. 145 and Sch. 15.

[147] *Ibid*. para. 7(2).

2.58 At common law the rule against perpetuities applies to all types of proprietary interests in property which are to arise at some time in the future. Thus the grant of a future easement not limited to arise within the perpetuity period will be void. Uncertainty as to whether the rule applied to easements[148] was resolved by *Dunn* v. *Blackdown Properties*[149] in which it was held that a right to use drains "now passing or hereafter to pass" under a private road, when no drain was in existence at the time of the grant, was void. Cross J. assumed, without deciding, that the provisions of s. 162(1)(d)(iv) of the Law of Property Act 1925 (which, for removing doubt, declared that the rule against perpetuities does not apply to the grant of an easement for the purpose of constructing sewers or drains) included the grant of a right to use the sewers or drains so constructed. But he held that the statutory provisions related only to rights ancillary to a valid easement and did not validate the grant. This judgment has been criticised,[150] but has been followed.[151]

Proprietary interests under the 1964 Act

2.59 The 1964 Act makes three main changes to the common law which are relevant to options created on or after 16 July 1964. The first is to exclude from the rule against perpetuities options to acquire for valuable consideration an interest reversionary (directly or indirectly) on the term of a lease in certain circumstances only. The option must be exercisable only by the lessee or his successors in title and must cease to be exercisable at or before the expiration of one year following the determination of the lease.[152] This reform was intended to permit options which encourage the lessee to maintain and develop the leasehold land and are for the public good.[153]

2.60 Secondly, the perpetuity period for a disposition of an option to acquire any interest in land for valuable consideration is 21 years.[154] The fixed period of up to 80 years cannot be used. However, if the option is void for perpetuity at common law, for example where there is no limit on the time during which it can be exercised, it is possible to wait and see if it is actually exercised within the twenty one year period.[155] During the "wait and see" period the option is treated as if it were not subject to the rule against perpetuities. It is unclear whether the 1964 Act applies the 21 year perpetuity period to certain rights of pre-emption. The Act provides that it does not apply to a right of pre-emption conferred in one

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148 See C. Sweet, "Recent decisions on the Rule against Perpetuities" (1911) 27 L.Q.R. 150, 155-6; and G. Battersby, "Easements and the Rule against Perpetuities", (1961) 25 Conv. (N.S.) 415, 416-8.

149 [1961] Ch. 433.

150 See *Hansard* (H.C.) 30 April 1964, vol. 694, cols. 699-701 (Mr. Charles Fletcher Cooke); *Hansard* (H.L.) 19 March 1964, vol. 256, cols. 973-6. See also Battersby, op. cit. n.148.

151 *Newham* v. *Lawson* (1971) 22 P. & C.R. 852.

152 1964 Act, s.9(1).

153 Fourth Report of the Law Reform Committee (1956) Cmnd. 18, paras. 36 and 37.

154 The 1964 Act, s.9(2).

155 *Ibid.*, s.3(3).

type of situation[156] which suggests that the subsection applies to other rights of pre-emption. However, the nature of rights of pre-emption was subsequently clarified by the Court of Appeal in *Pritchard* v. *Briggs*[157] and it now appears that they should be treated as outside the scope of the rule against perpetuities.[158]

2.61 The third change is not confined to options relating to land but applies to all inter vivos dispositions which take effect after 15 July 1964 and create interests in property. If one is void as against a third party for remoteness, it is also void between the original contracting parties.[159] The effect therefore is to subject both the personal obligations created by the contract and the interests in property to the same rule and thereby to overrule cases such as *Hutton* v. *Watling* and *Worthing Corporation* v. *Heather.*[160] However, if the inter vivos disposition is an option to acquire land for valuable consideration, the 21 year period will be the perpetuity period, whereas if it is another type of disposition, the rule against perpetuities will apply in the same way as it does to other dispositions. Thus if A agrees to sell land to B contingent on planning permission being obtained, one waits to see whether such permission is obtained within a period ending 21 years after the death of the survivor of A and B, but if it is not, then the contract will be void and no personal obligation can be enforced.

2.62 The 1964 Act contained no specific provision concerning easements aimed at solving the practical problems created by *Dunn* v. *Blackdown Properties Ltd.*[161] However, when the Act applies, easements which are void at common law may be saved by the "wait and see" provisions. It should not be forgotten that the Act's provisions concerning avoidance of contractual and other rights in cases of remoteness[162] can apply to easements.

Exceptions to the rule against perpetuities

(a) Law of Property Act 1925, s.162

2.63 The Law of Property Act 1925, s.162 lists, for the removal of doubt, certain rights to which the rule against perpetuities "does not apply and shall be deemed never to have applied". These include any power to distrain on or take possession of land or its income by

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156 When conferred on a public or local authority in respect of land used or to be used for religious purposes when the right becomes exercisable only if the land ceases to be used for such purposes.

157 [1980] Ch. 338. Goff L.J. suggested, at p.398, that legislation including the 1964 Act proceeded on the mistaken assumption that a right of pre-emption creates an interest in land.

158 See *Halsbury's Laws of England* (4th ed., 1981) vol. 35, para. 937 n.16.

159 The 1964 Act, s.10.

160 See para. 2.55 above.

161 [1961] Ch. 433. This was one of the points raised when the Perpetuities and Accumulations Bill was going through Parliament: see *Hansard* (H.C.) 30 April 1964, vol. 694, cols. 699-701 and *Hansard* (H.L.) 19 March 1964, vol. 256, cols. 973-6.

162 See para. 2.61 above.

way of indemnity against a rent,[163] any rentcharge created only as an indemnity against another rentcharge,[164] any power to retain or withhold payment of any instalment of a rentcharge as an indemnity against another rentcharge[165] and any grant, exception or reservation of any right of entry on or user of the surface of land or of any easements, rights or privileges over or under land for the purposes of certain works.[166] Such works include working mines and carrying away minerals, felling and carrying away timber, repairing, altering and adding to adjoining land and buildings on it, and constructing, repairing and maintaining sewers, water and gas pipes, and electric wires or cables. It appears that these rights can be only ancillary to other valid rights.[167]

(b) Charities

2.64 A gift over from one charity to another charity is exempt from the rule. This was established by *Christ's Hospital* v. *Grainger*[168] and was applied by the House of Lords in *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[169] The latter case concerned a gift by will of money on trust to be paid yearly to the trustees of Middlesex Hospital for certain charitable purposes. The testatrix directed that "should the Middlesex Hospital become nationalised or pass into public ownership there should be a gift over to the Royal College of Surgeons absolutely for its general purposes." At the testator's death, it was not certain that nationalisation would occur within the perpetuity period. Nevertheless, the House of Lords held that the gift over to the Royal College of Surgeons, a charity, was valid because it was exempted from the rule against perpetuities. The principle that a gift over from one charity to another is not subject to the rule has been exploited as a vehicle by which an indefinite non-charitable trust can be created. Thus in *Re Tyler*[170] a fund was given to one charity with a gift over to another charity if the family vault was not kept in repair.

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163 Law of Property Act 1925, s.162(1)(a).

164 *Ibid.*, s.162(1)(b).

165 *Ibid.*, s.162(1)(c).

166 *Ibid.*, s.162(1)(d).

167 *Dunn* v. *Blackdown Properties Ltd.* [1961] Ch. 433. See para. 2.58 above.

168 (1849) 1 Mac. & G. 460.

169 [1952] A.C. 631. The Historic Buildings and Ancient Monuments Act 1953, s.8(5) as amended by the National Heritage Act 1983, s.33, Sch.4, para.10. contains a similar statutory exception to the rule against perpetuities for gifts over to charitable trusts where they follow a non-charitable gift for the endowment of a historic building which has been accepted by the Secretary of State. There are similar statutory exceptions if a gift over follows such a gift or a non-charitable gift for the endowment of a historic garden which has been accepted by the Historic Buildings and Monuments Commission for England: The Historic Buildings and Ancient Monuments Act 1953, ss.8(A)(5) and 8(B)5) as amended by the National Heritage Act 1983, s.33, Sch.4, para.10.

170 [1891] 3 Ch. 252.

2.65 No charitable gift is void merely because the charity may continue and its property may be held in perpetuity. Once effectively given, it is taken out of the scope of the rule.[171] Subject to this and to the special position of gifts over from one charity to another, the rule applies to dispositions to charity in the same way as any other disposition. The rule is likely to be relevant primarily in the case of three types of gift:[172] first, a gift to a charity which is conditional on the happening of a remote contingent event;[173] secondly, a gift to an individual followed by a remote gift to a charity; and, thirdly, a gift to a charity followed by a remote gift to an individual. In the third case, if there is a gift to charity in perpetuity with a gift over to an individual on a contingency which may not happen within the perpetuity period, the gift to charity will become absolute.[174]

2.66 The 1964 Act applies to instruments making gifts to charities which take effect after 15 July 1964. The "wait and see" provisions may save a remote contingent gift to charity or a remote gift over from an individual to charity or from a charity to an individual.[175]

(c) Pension schemes

2.67 Pension schemes are generally set up under trusts.[176] Under such trusts benefits are commonly made contingent on attaining a pensionable age and some benefits may be dependent on exercises of discretion by trustees. The rule against perpetuities therefore generally applies to these trusts and the dispositions made under them. The difficulties of applying the rule to them are largely avoided today because of the Social Security Act 1973, s.69,[177] which exempts pension schemes which have the qualifications specified in the section and the Regulations[178] made under it from the rules. The following types of pension

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171 *Chamberlayne* v. *Brockett* (1872) 8 Ch. App. 206, 211.

172 These situations are discussed in more detail in *Gray on Perpetuities* (4th ed., 1942) paras. 592-6 and 605-6.

173 E.g. see *Re Lord Stratheden and Campbell* [1894] 3 Ch. 265.

174 *Re Bowen* [1893] 2 Ch. 491. If the gift to charity is not in perpetuity but for a limited period, the invalidity of the gift over would cause a resulting trust on the termination of the period: *Re Randell* (1888) 38 Ch.D.213.

175 Maudsley, op. cit., pp. 179-181, gives examples of how the 1964 Act would apply to the types of gift outlined above.

176 See Pension Law Reform - the Report of the Pension Law Review Committee (1993), Cm. 2342, vol.1, para.2.2.7. Paras.2.1.23 and 3.1.45 of the Report contain a history of the application of the rule against perpetuities to pension schemes.

177 As amended by the Social Security Pensions Act 1975, s.65(1), Sch.4 and the Social Security Act 1986, s.86(1) Sch.10, Pt 1. The National Westminster Bank Act 1969, s.11(5) exempts the trusts of any pension schemes authorised by the Act from the rule against perpetuities. Prior to the enactment of the Social Security Act 1973, the only statutory provisions exempting certain pensions from the rule against perpetuities were contained in the Superannuation and Other Trusts Funds (Validation) Act 1927. For an explanation of the current position regarding these provisions see *Halsbury's Laws of England* (4th ed., 1981) vol.35, para.944 n.1.

178 The Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990.

schemes qualify for the exemption: (i) a personal or occupational scheme;[179] (ii) a public service scheme;[180] (iii) a contracted-out occupational scheme and appropriate personal scheme in relation to any employment; (iv) a scheme which satisfies the requirements of the Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990.[181] The main requirements of these regulations are that the scheme is occupational and is "exempt from tax or has the approval of the Inland Revenue or that it is personal and has the approval of the Inland Revenue." In certain circumstances a scheme can have the benefit of the regulations even when it does not satisfy these conditions providing an application for approval has been made.[182]

2.68 It should be noted that trusts created and dispositions made before a pension scheme first qualified for exemption under the Social Security Act 1973, s.69, are also exempt from the rule against perpetuities, although the section does not validate these trusts or dispositions if the rule already required them to be treated as void before the pension scheme first qualified for the exemption.

2.69 The exemption contained in the Social Security Act 1973, s.69 is wide but it does not apply to all pension schemes. It is necessary to check whether the rule against perpetuities applies to each scheme. Where a scheme ceases to qualify for the exemption, the trusts of the scheme and any dispositions made under it again become subject to the rule against perpetuities as if they had never qualified.[183] A scheme which ceases to qualify is still permitted to have the benefit of the exemption for a period of two years from the date when it ceased to qualify. The Occupational Pensions Board may give a particular scheme such longer period of exemption as it considers reasonable.[184] It has been suggested to us that it is unclear whether sub-trusts created under an exempt pension scheme have the benefit of the exemption. For example, these trusts may arise where the trustees have power to pay the whole or part of a death benefit into a separate trust for the benefit of the member's relatives or dependants in the exercise of the trustees' discretionary powers. It could be argued that they are "trusts of the pension scheme and dispositions made under it or for its purposes" and that they are therefore within the scope of Social Security Act 1973, s.69(1) as amended.

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[179] Social Security Act 1973 s.69(1) (as amended). The definition of a personal pension scheme is contained in the Social Security Act 1986, s.84. It is inserted in the Social Security Act 1973, s.99 by the Social Security Act 1986, s.86(1), Sch.10, Pt.1, para 8. The definition of an occupational pension scheme is contained in the Social Security Act 1973, s.51(3)(a).

[180] Social Security Act 1973, s.51(3)(b).

[181] The requirements are set out in Regulations 3 and 4.

[182] *Ibid.*, rr.3(5) and (4) made under the Social Security Act 1973, s.69(5) as amended.

[183] See the Social Security Act 1993, s.69(6)(b).

[184] Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990, r.5 made under the Social Security Act 1973, s.69(5) as amended.

(d) Limitations after entails

2.70 The rule against perpetuities does not apply to an estate tail because a tenant in tail can at any time bar the entail.[185] Limitations which take effect on the determination or on defeasance of a valid estate tail are for that reason treated as valid. But interests which may vest after the natural determination of the estate tail are void under the rule against perpetuities at common law, because although the barring of the entail, whilst it continued, would destroy such an interest, the ending of the entail would leave it liable to vest at too remote a time.[186] The 1964 Act did not alter these rules though it may save void dispositions under instruments taking effect after 15 July 1964 by the operation of the "wait and see" rule.

(e) Forfeiture of leases and enforcement of rentcharges

(i) FORFEITURE OF LEASES

2.71 There is little direct authority, but it seems to be generally accepted that the rule against perpetuities does not apply to forfeiture clauses in leases, even though the contingent right of re-entry which such a clause gives to the reversioner is a proprietary interest.[187] Gray explains this on the ground that the interest of the reversioner is a vested interest.[188]

(ii) ENFORCEMENT OF RENTCHARGES

2.72 The position regarding the application of the rule against perpetuities to rights of re-entry in respect of rentcharges varies in accordance with whether or not the 1964 Act applies to the rentcharge in question. Where the 1964 Act does not apply to it only the "powers or remedies" conferred by the Law of Property Act 1925, s.121[189] are excluded from the common law rule against perpetuities. This means that a remedy such as a right to enter on non-payment of the rentcharge and recover the arrears by distress is excluded from the rule.[190] However, it is uncertain whether an express right of re-entry for non-payment of rent or a right of re-entry for breach of a covenant, for example to repair or insure, is exempt.[191] When the 1964 Act[192] applies to the rentcharge, all rights of re-entry

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185 See, for example, *Newell* v. *Crayford Cottage Society* [1922] 1 K.B. 656, 663, per Younger L.J.

186 See Morris and Leach, op. cit., at p.195.

187 See *Re Tyrrell's Estate* [1907] 1 I.R. 292, 298 and Megarry and Wade, op. cit., pp.294-5.

188 Op. cit., para. 303.

189 From s.121(6) of the Law of Property Act 1925 the words "nor to the same or like powers or remedies conferred by any instrument for recovering or compelling the payment of any annual sum within the meaning of this section" were repealed by s.11(2) of the 1964 Act, but are still relevant for rentcharges to which the 1964 Act does not apply.

190 For an explanation of the remedies conferred by the Law of Property Act 1925, s.121 see Report on Rentcharges (1975), Law Com. No. 68, para. 22.

191 See the Fourth Report of the Law Reform Committee (1956) Cmnd.18, paras 42 and 43, where the reason for this uncertainty is explained.

exercisable in respect of it whether for non-payment of the rent or breach of any other terms of the grant are excluded from the rule against perpetuities.[193]

(f) Mortgages

2.73 The period during which the right of redemption is postponed does not have to be limited to the perpetuity period.[194]

(g) Joint tenancies

2.74 A joint tenant's right of survivorship is exempt from the rule because it can always be destroyed by severance by the other joint tenant.[195]

(h) Interests in foreign property

2.75 Interests in foreign property which are limited or settled in a manner valid by the law of the place where they are situated cannot be void for perpetuity under English law.[196]

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[192] S.11. The powers or remedies for recovering or compelling the payment of an annual sum to which the Law of Property Act 1925, s.122 applies are also excluded by this section. Section 122 concerns the remedies in respect of rentcharges charged on other rentcharges.

[193] The exception puts into effect a recommendation of the Law Reform Committee: see the Fourth Report (1956) Cmnd. 18, para. 43.

[194] *Knightsbridge Estates Trust Ltd.* v. *Byrne* [1940] A.C. 613.

[195] *Re Roberts* (1881) 19 Ch. D. 520.

[196] See *Halsbury's Laws of England* (4th ed., 1981), vol.35, para. 941.

PART III

THE PRESENT LAW OF THE RULE AGAINST EXCESSIVE ACCUMULATIONS

Statement of the rule

3.1 At common law the only restriction on the ability of a disponor to direct an accumulation of the income of property disposed of was the rule against perpetuities. The rule against excessive accumulations is statutory.[1] With limited exceptions[2] it prevents a person from settling or disposing of any property[3] by any instrument[4] or otherwise[5] in such manner that the income of it is wholly or partially accumulated for any period longer than one permitted by statute. The Law of Property Act 1925, s.164(1) specifies four such periods and, in relation to instruments to which the 1964 Act applies, s.13 specifies two further periods.[6]

Meaning of "accumulation"

3.2 There is no statutory definition of "accumulation". It is a term of art the meaning of which was assumed to be known when the Thellusson Act was passed. The long title to and the opening recital of that Act indicate that an accumulation involves the postponement of the beneficial enjoyment of income. From the exceptions in s.164(2) of the 1925 Act it is apparent that but for them, a provision for the payment of debts or for raising portions is or may be a provision for accumulation. No other guidance on the meaning of an accumulation is given by the statutory provisions.

3.3 The meaning of "accumulation" was discussed by the Court of Appeal in *Re Berkeley*.[7] Harman L.J. said: "Accumulation to my mind involves the addition of income to capital, thus increasing the estate in favour of those entitled to capital and against the

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1 For the origins of the rule see para. 1.7 above.

2 Law of Property Act 1925, s.164(2) and see paras. 3.28-3.36 below.

3 This includes any thing in action and any interest in real or personal property: *ibid.*, s.205(1)(xx).

4 This includes any statute creating a settlement: *ibid.*, s.205(1)(viii).

5 This includes an oral declaration of trust.

6 Three of the statutory periods, in so far as they allow for accumulation during a minority, are affected by the Family Law Reform Act 1969. Section 1 of this Act reduced the age of majority from 21 years to 18 years with effect from 1 January 1970. A reference to "minority" in any deed, will or other instrument made on or after 1 January 1970, or in any statutory provision, whether passed before or after that date, is to be construed as a reference to the attainment of the age of 18. However, s.1(4) stipulates that this reform is not to invalidate any direction for accumulation in a settlement or other disposition made by deed, will or other instrument made prior to 1 January 1970.

7 [1968] Ch. 744.

interests of those entitled to income."[8] Widgery L.J. added: "I doubt if the word "accumulation" signifies more than a simple aggregation of instalments of income to create a single fund, but the reference to accumulation for a *period* [in Law of Property Act 1925, s.164(1)] clearly implies, in my judgment, a mounting fund which reaches a climax at the end of the period."[9] He considered that the mere fact that a testator had authorised interim payments out of an accumulating fund would not in itself exclude the operation of the section, but that unless the effect of the disposition was the building up of a fund which was to become available for some specific object at the end of a period, the case would prima facie be outside the mischief of the statute.

3.4 In most cases, income will be directed to be accumulated by investment.[10] There is no doubt that this is "accumulation" within the meaning of the statute. Directions to retain income to meet a future income application are not directions to accumulate within the meaning of the statutory provisions. In *Re Berkeley*,[11] annuities were charged on the income of the residue under a will. This created an implied trust to retain the surplus income of the residue accruing in any year in order to secure payment of the annuities in the event of a deficiency of income in a future year.[12] Was that an implied direction to accumulate the surplus income for 21 years from the testator's death? It was held that there was no direction to accumulate within the meaning of the statute. Harman L.J. said: "The mere retention of income on the *In re Coller* principle does not alter its nature: it remains income and will be paid out to the income beneficiaries when no longer required to secure the annuitants' rights".[13] Russell L.J., agreeing, described the case as "involving ... only de facto accumulation caused by uncertainty as to the availability of assets".[14]

3.5 There are other instances of retentions which could not be accumulations for the statutory purposes. Russell L.J. gave a hypothetical example in *Re Berkeley* of "an estate ... of great complication, so that for many years it is a matter of uncertainty whose beneficial claims will be able to be met: the executors in such a case must reserve in hand ... income of the estate pending the day when the full facts are revealed about the availability of assets to meet different beneficial claims." He described this as "de facto accumulation necessitated by due administration" but he did not consider it to be an accumulation within the meaning

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8 *Ibid.*, at p.772.

9 *Ibid.*, at p.780.

10 See, for example, Trustee Act 1925 s.31(2).

11 [1968] Ch. 744

12 *Re Coller* [1939] Ch. 277.

13 *Re Berkeley*, supra, at p.772.

14 *Ibid.*, at p.776.

of the statute.[15] In *Re Berkeley* Harman L.J. treated as analogous to the retention of income in that case money retained against liabilities for repairs or covenants in leases.[16]

3.6 The question of whether directions to apply income are directions to accumulate within the statute can be difficult. A direction to apply income to the maintenance of property is not an accumulation; even if the direction is worded so as to allow expenditure on "improvements", it would not fall within the statute to the extent that it allowed expenditure on maintaining houses and tenements in good habitable repair.[17] But expenditure on improvements - extending beyond maintenance to enhancing the trust property, such as by erecting new buildings, or expenditure on purchasing additional property - would be within the statute.[18] Similarly, to apply income on keeping up a policy of insurance to replace capital lost through the retention of a wasting asset, such as a leasehold, is not an accumulation within the statute.[19] In *Re Rochford's Settlement Trusts*[20] Cross J., after considering *Vine* v. *Raleigh*, *Re Mason* and *Re Gardiner*, said: "Those cases undoubtedly show that a provision for accumulating income which goes no further than a prudent owner would go in the management of the property in question is not within the Act. A prudent owner of a wasting asset such as a lease sets aside some part of the rent to form a sinking fund, and the prudent owner of house property sets aside some part of the rents to meet future liabilities for repairs and rebuilding.... But I do not think one can fairly deduce from these cases that any provision for accumulation, even if it extends to the whole income, is outside the Act if it is simply directed to making good capital losses.". He held that a direction to pay estate duty out of the income of a trust fund, which required the accumulation of all the income for several years, was within the statute.

3.7 It has been held that a direction by will to pay out of the income of the testator's property the premiums on a policy of insurance effected by the testator on another's life was not an accumulation for the statutory purposes.[21] This decision has been followed[22] but the correctness of the views of Turner V-C has been debated and in *Carver* v. *Duncan* Oliver L.J. cast doubt on it, suggesting that there were strong arguments for saying that the payment of premiums on life policies in some circumstances constituted an accumulation of income.[23] The approach of Lord Templeman in that case suggests that the test to be applied is whether

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[15] *Ibid.*

[16] *Ibid.*, p.772. Harman L.J. referred to *Vine* v. *Raleigh* [1891] 2 Ch. 13 and *Re Mason* [1891] 3 Ch. 467 as instances of retentions for these purposes.

[17] *Vine* v. *Raleigh*, supra; *Re Mason*, supra; see also *Carver* v. *Duncan* [1983] 1 W.L.R. 494, 506.

[18] *Vine* v. *Raleigh*, supra, at p.26.

[19] *Re Gardiner* [1901] 1 Ch. 697.

[20] [1965] Ch. 111, 124-5.

[21] *Bassil* v. *Lister* (1851) 9 Hare 177.

[22] *Re Vaughan* [1883] W.N. 89; *Re A.E.G. Unit Trust (Managers) Ltd.'s Deed* [1957] Ch. 415.

[23] [1985] A.C. 1082, 1100.

the income is directed to be applied on a capital, as distinct from an income, expense; if so, that is an accumulation.[24] However, the question whether there was a provision for accumulation within the statute was not one which directly arose in that case.

3.8 It seems reasonably certain, although the Law Reform Committee considered in 1956 that the point was not entirely beyond argument,[25] that an accumulation at simple interest (that is, one in which the income of the accumulated interest is not itself accumulated) is an accumulation for the statutory purposes as well as one at compound interest.[26] This view is supported by the wording of the Law of Property Act 1925, s.164(1), which prohibits directions for income to be "wholly or partially accumulated" for longer than one of the permitted periods.[27] In respect of instruments taking effect after 15 July 1964, any doubt is removed by the 1964 Act, which provides that the statutory restrictions on accumulations apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated.[28]

Directions to which the statutory provisions apply

3.9 For the statutory provisions to apply, there must be a direction to accumulate.[29] That direction may, however, be implied, and although there was once uncertainty whether there could be a direction in the form of a power as distinct from a trust, it is now settled that there can be.[30]

Implied Trusts

3.10 The rule against excessive accumulations applies to any disposition where an accumulation of income must result.[31] Thus where residuary personalty was given on trust for a person yet unborn the House of Lords in *Bective* v. *Hodgson*[32] held that the gift carried the intermediate income which had to be accumulated for 21 years from the death of the testator. It has been suggested that to accumulate income which accrues before the

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[24] *Ibid.*, pp.1122-24.

[25] Fourth Report (1956), Cmnd. 18, para. 60.

[26] *Re Hawkins* [1916] 2 Ch. 570; *Re Garside* [1919] 1 Ch. 132.

[27] See *Re Hawkins*, supra, 577; *Re Berkeley dec'd.* [1968] Ch. 154, 165.

[28] The 1964 Act, s.13(2).

[29] *Bridgnorth Corp.* v. *Collins* (1847) 15 Sim. 538, 540, where Shadwell V-C said: "The statute does not apply to accidental accumulation."

[30] See para. 3.11 below.

[31] See Morris and Leach, op. cit., pp.274-6.

[32] (1869) 10 H.L.C. 656. Since the enactment of the Law of Property Act 1925 s.175(1) the like result would obtain in relation to a residuary devise of real property in a Will coming into operation after the commencement of that Act, as that sub-section provides that subject to the statutory provisions relating to accumulations, such a gift carries the intermediate income.

contingency on which a gift depends either happens or becomes impossible, so far as the law allows, accords with the intention of a donor who has not directed it to be applied in some other way.[33] Although the statutory provisions for accumulation during the infancy of a beneficiary for whom any property is held,[34] might at first sight apply, the implied trust to accumulate may exclude it.[35] It is a question of construction in each case whether an accumulation is impliedly directed.

Powers to Accumulate

3.11 Following some uncertainty about powers, as distinct from duties, to accumulate,[36] the House of Lords decided that the rule against excessive accumulations applied to them.[37] The statutory provisions were held to apply to an inter vivos settlement that came into effect in 1958 which provided that the trustees had power "at their discretion to accumulate any part or even the whole of the income in any year if it seems advisable to have to do so".[38] The point is expressly dealt with by the 1964 Act with respect to dispositions to which that Act applies: the Law of Property Act 1925, s.164, applies to powers to accumulate income whether or not there is a duty to exercise that power.[39]

The statutory accumulation periods

3.12 There are six statutory periods during which accumulation may take place;[40] they are alternatives, and may not be applied consecutively after one another.[41]

(a) The life of the grantor or settlor[42]

3.13 This period can only apply to inter vivos dispositions made by individuals.[43] For fiscal reasons it has rarely been chosen expressly by grantors and settlors. But in a number

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[33] *Re Geering* [1964] Ch. 136, 144.

[34] Trustee Act 1925, s.31(2).

[35] *Ibid.*, s.69(2). See *Lewin on Trusts* (16th ed., 1964), p.90.

[36] See the Fourth Report of the Law Reform Committee (1956), Cmnd. 18, para. 60.

[37] *Baird* v. *Lord Advocate* [1979] A.C. 666.

[38] *Ibid.*, at p.668. Although this was a Scottish case, raising a question of construction on Trusts (Scotland) Act 1961, s.5, the provisions of that section are the same as those of the Law of Property Act 1925, s.164.

[39] The 1964 Act, s.13(2).

[40] Law of Property Act 1925, s.164, as amended by the 1964 Act, s.13.

[41] See, for example, *Jagger* v. *Jagger* (1884) 25 Ch. D. 729.

[42] Law of Property Act 1925, s.164(1)(a).

[43] *Re Dodwell & Co. Ltd.'s Trust* [1979] Ch. 301. See para. 3.33 below.

of cases where an accumulation has been directed, the Court has held, usually by eliminating the other periods as inappropriate, that this period applies and that any accumulation after the death of the grantor or settlor is bad. An example is *Re Bourne's Settlement*.[44] In that case the settlor directed that the income of a fund be accumulated until the youngest of seven grandchildren attained the age of 23, that the capital of the fund should then be given to the eldest grandchild then living and that the accumulations should be distributed among the other grandchildren then living and the children then living of a deceased grandchild. It was held that the periods other than the life of the settlor were inapplicable.

(b) A term of twenty one years from the death of the grantor, settlor or testator[45]

3.14 The period runs from the day after the death of the disponor,[46] so that dividends which become due on the 21st anniversary of the death are validly accumulated. This remains so even if the accumulation commences at a later date: for example, an accumulation starting ten years after the donor's death (perhaps after the death of an annuitant or life tenant) can only continue for eleven years under this period.[47]

(c) The duration of the minority or respective minorities of any person or persons living or en ventre sa mère at the death of the grantor, settlor, or testator[48]

3.15 This period applied, e.g. where there was a direction by will to accumulate during the minorities of the children of A, which was restricted to the minorities of those of A's children who were living at the testator's death.[49] The period only applies to a direction to accumulate from the date of the death of the disponor.[50] But it is not apparent why, as with the second period, an accumulation could not validly be directed after a life interest. The references to a minority must now be construed in the light of the changes effected by the Family Law Reform Act 1969.[51]

(d) The duration of the minority or respective minorities only of any person or persons who under the limitation of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated [52]

3.16 There is some overlap between this and the third period. It differs in that the accumulation period may be measured by the minorities of children born after the death of

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44 [1946] 1 All E.R. 411.

45 Law of Property Act 1925, s.164(1)(b).

46 *Gorst* v. *Lowndes* (1841) 11 Sim. 434.

47 See, for example, *Webb* v. *Webb* (1840) 2 Beav. 493; *A-G* v. *Poulden* (1844) 3 Hare 555.

48 Law of Property Act 1925, s.164(1)(c).

49 *Re Watt's Will Trusts* [1936] 2 All E.R. 1555.

50 *Jagger* v. *Jagger* (1884) 25 Ch. D. 729, 733, per Kay J.

51 See n.6 above.

52 Law of Property Act 1925, s.164(1)(d).

the grantor, settlor or testator.[53] It is also narrower in that the minorities must be of persons who, if of full age, would be entitled to the income directed to be accumulated. The effect of including the minorities of children born after the death of the donor is that under this period accumulations may continue for very considerable periods of time. The Law Reform Committee gave the example of a testator giving his residue to all the children of his sons, whether born before or after his death, and directing the income of their shares to be accumulated during their respective minorities. "If, when the testator dies, there is only one member of the class, an infant, accumulation of the whole fund will begin forthwith. If later another member of the class is born, the first member is divested in his favour of one half of his presumptive share, and accumulation on that half will continue for the whole of the minority of that second member. A similar process takes place when further members of the class are born, so that ultimately accumulation of the shares taken by the most junior members of the class may have continued for 50 years or more."[54] There appears to be no reason why, in theory, it should not be possible for accumulations to continue for the full maximum duration of the perpetuity period, though limited to the income to which the minor or minors would be entitled if of full age.

3.17 The Law of Property Act 1925, s.166(1), restricts to this period the settlement or disposition "of any property[55] in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land[56] only...". The section does not apply to "accumulations to be held as capital money for the purposes of the Settled Land Act 1925, or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land".[57] The references to a minority in s.164(1)(d) and s.166(1) again fall to be construed subject to the Family Law Reform Act 1969.[58]

(e) A term of twenty-one years from the date of the making of the disposition[59]

3.18 This period was enacted on the recommendation of the Law Reform Committee, which felt that there was "no merit in confining the starting point of the period of 21 years to the death of the grantor, settlor or testator".[60] It applies only in relation to instruments taking effect on or after 16 July 1964.

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53 *Re Cattell* [1914] 1 Ch. 177.

54 Fourth Report (1956), Cmnd. 18, para. 58.

55 For the meaning of "property" see n.3 above.

56 For the meaning of "land" see the Law of Property Act 1925, s.205(1)(ix).

57 *Ibid.*, s.166(2).

58 See n.6 above.

59 The 1964 Act, s.13(1)(a).

60 Fourth Report (1956), Cmnd. 18, para. 56.

(f) The duration of the minority or respective minorities of any person or persons in being at that date[61]

3.19 The Law Reform Committee[62] considered that a similar point arose in relation to the third period, and that it should be made possible for a living settlor to select the minorities of persons living or en ventre sa mère at the date of the settlement as an alternative to persons living or en ventre sa mère at the settlor's death. The introduction of this additional period implemented that recommendation. It again applies only in relation to instruments taking effect on or after 16 July 1964, and references to a minority must be read subject to the Family Law Reform Act 1969.[63]

Choice of period

3.20 The donor may specify which accumulation period is to apply. But in the reported cases donors not infrequently direct accumulation for a period which is not specifically related to a statutory period and is excessive. Although statute provides that where an accumulation which is directed otherwise than as permitted the direction shall be void,[64] this has been interpreted as avoiding only the excess over the relevant accumulation period.[65]

3.21 The relevant accumulation period has been said to be the statutory period which the disponor seemingly selected according to the language employed and the facts of the case.[66] Upjohn J. described this test as "artificial and difficult".[67] He pointed out that in most cases dealing with the rule against excessive accumulations the disponor has given directions clearly not having the rule in mind at all. However, there will usually be some periods which are inappropriate and can be eliminated. For example, an accumulation in a testamentary disposition cannot attract the first period. With the remainder "the Court has to do its best to select the most appropriate period...or...the least inappropriate."[68] To give an illustration, in *Re Ransome*[69] a testatrix directed that the income of a fund be accumulated until the youngest child of her grandson attained 21 and that the trustees should then hold the fund and the accumulations for such of the children of that grandson as should then be living. Sixteen years after the death of the testatrix, a child of the grandson attained 21. There were no other children of the grandson then living though it was possible that others could come

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61 The 1964 Act, s.13(1)(b).

62 Op cit., at para. 57.

63 See n.6 above.

64 Law of Property Act 1925, s.164(1).

65 *Griffiths* v. *Vere* (1803) 9 Ves. Jun. 127; *Eyre* v. *Marsden* (1838) 2 Keen 564, 574.

66 *Re Watt's Will Trusts* [1936] 2 All E.R. 1555, 1562.

67 *Re Ransome* [1957] Ch. 348, 361.

68 Maudsley, op. cit., at p.208.

69 Supra.

into existence. Of the four original periods, the second and third were the competing periods. Upjohn J. said "Neither sub-paragraph fits in, in the least degree, with the directions of the testatrix."[70] He held that the period of 21 years from the death of the testatrix was the appropriate period as in directing accumulations until the youngest great-grandchild attained 21, the testatrix could hardly have contemplated that the period of accumulation would in fact have come to an end when the eldest great-grandchild attained 21.

Excessive accumulations

3.22 The effect of a direction to accumulate income for a period in excess of one of the permitted accumulation periods is different from the effect of a breach of the rule against perpetuities. The direction to accumulate is not void ab initio, but rather it is valid for the relevant statutory accumulation period and void only as to the excess. Furthermore, it is only the direction to accumulate that is void as to the excess; the remainder of the instrument is not invalidated.[71] However, a direction for accumulations for any period of whatever length for the benefit of a person who has a vested interest is valid, because he is not bound to wait until the expiration of the accumulation period but once competent to give a valid discharge he can end the accumulation and require payment.[72]

3.23 However, a direction to accumulate income for a period which may possibly exceed the appropriate perpetuity period is wholly void.[73] It seems probable that "wait and see" cannot be applied to such a direction because it falls outside the stipulation in s.3(1) of the 1964 Act that "wait and see" shall be applied where "a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time".[74]

Surplus income

3.24 The destination of the surplus income that is released when an excessive accumulation has been directed is determined by the wording of the final part of the Law of Property Act 1925, s.164(1):

> "...the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed."

In *Berry* v. *Geen*, Lord Maugham L.C., considered whether, after directions by a testator for annuities and the excessive accumulation of income whilst any annuitant was alive, a gift of all his property after the death of the last annuitant included the surplus income. "It is well

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[70] [1957] Ch. 348, 361.

[71] *Eyre* v. *Marsden* (1838) 2 Keen 564, 574.

[72] *Saunders* v. *Vautier* (1841) Cr. & Ph. 240. See para. 3.26 below.

[73] *Lord Southampton* v. *Marquis of Hertford* (1813) 2 V. & B. 54.

[74] The point is open to some doubt: see Megarry and Wade, op. cit., pp.304-5.

settled that the proper method of approach to this question is to construe the will as it stands without regard to the statutory limit of accumulation, and then to consider the effect of the Act upon the dispositions contained in the will."[75] The effect of the subsection is generally that surplus income devolves as if a gap had been left between the end of the permitted accumulation period and the commencement of the interest of the party taking subject to the accumulation. The interest of this party is generally not accelerated.[76]

3.25 If property is given on charitable trusts, with an invalid direction to accumulate surplus income, it is possible that the direction to accumulate may be treated as a mere administrative direction which can be disregarded, so that surplus income does not go to the residuary legatees or next-of-kin but is applicable cy-près.[77] Such a result will not be achieved unless a general charitable intention is found.

Saunders v. Vautier

3.26 The rule in *Saunders* v. *Vautier*[78] can be seen as analogous to an exception to the rule against excessive accumulations: it operates to avoid the need to apply the statutory provisions relating to accumulations. A beneficiary of full age who alone is interested in an accumulation is able to put an end to it notwithstanding that the accumulation is directed to continue for a longer period. The same applies if the beneficiary for whose benefit the accumulation is directed is a charity.[79] Similarly, where there are several persons who have vested or contingent interests in the property, and they are all of full age, they may join together to end the accumulation.[80] A common situation where the rule may be used is where property is given to A subject to a direction to accumulate income until A attains 25 and then to transfer the property and accumulations to A. On becoming of full age, A is able to put an end to the trust for accumulation and call for immediate payment.

3.27 In the case of dispositions coming into effect on or after 16 July 1964, the situations in which the rule in *Saunders* v. *Vautier* is applicable may be extended as a result of the combined operation of ss.14 and 2 of the 1964 Act. Section 14 provides that s.2, dealing with presumptions and evidence as to future parenthood, shall apply to any question as to the right of beneficiaries to put an end to accumulations of income under a disposition. There

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75 [1938] A.C. 575, 581.

76 See Morris and Leach, op. cit., pp.295-300; and *Halsbury's Laws of England* (4th ed., 1981), Vol. 35, para. 1049 where an exception to this principle is discussed. The exception is that where a primary gift of an interest is cut down by or charged only with a trust for accumulation and that trust exceeds the appropriate statutory period, the trust for accumulation is rejected for the excess and the primary gift takes effect free from it.

77 *Martin* v. *Maugham* (1844) 14 Sim. 230; *Re Bradwell* [1952] Ch. 575.

78 (1841) 4 Beav. 115; Cr. & Ph. 240. See also Morris and Leach, op. cit., pp. 289-295; Megarry and Wade, op. cit., pp.307-8.

79 *Wharton* v. *Masterman* [1895] A.C. 186.

80 *Saunders* v. *Vautier* (1841) 4 Beav. 115, 116, per Lord Langdale. See also Lord Davey in *Wharton* v. *Masterman* [1895] A.C. 186, 198, where he says: "or (in other words) the court holds that a legatee may put an end to an accumulation which is exclusively for his benefit."

are no reported cases on s.14 but its effect can be seen by analysing the difference it would have made, had it applied to a case decided before 1964. In *Re Deloitte*[81] a will contained a direction to pay an annuity out of a fund to the testator's niece for her life, the excess to be accumulated 21 years from the testatrix's death. After the niece's death, the fund was to be held for all her children born before or after the testator's death. On the expiry of the proper period of accumulation the niece was 65 years old and had six children. It was held that the class was not closed because, applying *Jee* v. *Audley*,[82] there was a presumption that the niece could still bear children. Sections 14 and 2 of the 1964 Act would have operated to allow the application of the rule in *Saunders* v. *Vautier*, since as the niece was over 55 years old it would have been assumed that she was past the age of child bearing. Therefore the children would have had an absolute and indefeasible interest in the capital of the fund and, being over 21, could have ended the settlement.

Exceptions to the Rule against Excessive Accumulations

(a) Payment of debts

3.28 The rule against excessive accumulations does not extend to any provision "for payment of the debts of any grantor, settlor, testator or other person".[83] The debts may be past, present or contingent, provided that a legal liability existed at the time when the instrument providing for the accumulation took effect,[84] and, as the wording of the Act suggests, they may be debts of a stranger as well as those of the donor.[85] This only applies to an accumulation designed in good faith for the payment of debts only, even though nothing may ever become payable.[86] The provision must be for the payment of debts out of the accumulated income: it is not for recoupment of the capital of the settlement which was used to pay the debts.[87]

(b) Portions

3.29 The rule does not apply to any provision for raising portions for (a) any child, children or remoter issue of any grantor, settlor or testator, or (b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited.[88] This amended the Accumulations Act 1800, s.2, by including portions for issue remoter than children, by

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[81] [1926] Ch. 56.

[82] (1787) 1 Cox 324. See para. 2.9 above.

[83] Law of Property Act 1925, s.164(2)(i).

[84] *Re Rochford's Settlement Trusts* [1965] Ch. 111, 127.

[85] *Barrington* v. *Liddell* (1852) 2 De G. M. & G. 480, 497.

[86] *Varlo* v. *Faden* (1859) 1 De G. F. & J. 211.

[87] *Re Heathcote* [1904] 1 Ch. 826.

[88] Law of Property Act 1925, s.164(2)(ii).

making it clear that the relevant interest of a parent or ancestor under sub-paragraph (b) need not be in the very property the income of which is to be accumulated and by widening the relevant disposition to any settlement or other disposition. "Portion" has been explained as generally understood to mean "a sum of money secured to a child out of property either coming from or settled upon its parents",[89] but its precise meaning in the section is not clear.[90] The cases provide some guidance on the limits of the exception. The issue for whom portions are to be raised formerly had to be legitimate,[91] but that limitation does not apply in relation to dispositions taking effect on or after 25 July 1969.[92] They may come into existence after the date of the relevant disposition.[93] Although portions were often directed to be raised for younger children under a strict settlement, a benefit may be a portion even if given to every child.[94] Further, the exception is not confined to portions out of real estate.[95] The portions are not confined to those directed to be raised by the instrument directing accumulation but may be created by any other prior instrument.[96] But it must be raised out of a larger fund; a provision for increasing the whole fund by accumulation and paying over the augmented fund is not a provision for raising a portion within the section.[97]

(c) Timber or wood

3.30 There is also an exception for "the accumulation of the produce of timber or wood".[98] There are no reported cases on this provision.

(d) Law of Property Act 1925, s.165

3.31 The Law of Property Act 1925, s.165 provides that where accumulations are made during a minority "under any statutory power or under the general law," the period for which such accumulations are made is not to be taken into account in determining the permitted accumulation period under that Act. This provision is not found in the Accumulations Act 1800 but it operates retrospectively. Although the section refers to "any statutory power", the reference must be construed as applying to the Conveyancing Act 1881, s.43, now replaced as respects accumulations by the Trustee Act 1925, s.31 (as amended by the Family Law Reform Act 1969), allowing trustees to apply income for the maintenance of an infant

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89 *Re Stephens* [1904] 1 Ch. 322 at 327 per Buckley J.

90 Megarry and Wade, op. cit., p.308.

91 *Shaw* v. *Rhodes* (1835) 1 My. & Cr. 135, 159.

92 Family Law Reform Act 1969, s.15.

93 *Beech* v. *Lord St. Vincent* (1850) 3 De G. & Sm. 678.

94 *Re Stephens*, supra.

95 *Re Elliott* [1918] 2 Ch. 150, 153.

96 *Halford* v. *Stains* (1849) 16 Sim. 488, 496.

97 *Eyre* v. *Marsden* (1838) 2 Keen 564.

98 Law of Property Act 1925, s.164(2)(iii).

beneficiary for whom property is held, but otherwise obliging them to accumulate the income. Thus, for example, where a testator directs income to be held upon trust for the children of his son who shall attain twenty-one, there is an implied trust to accumulate the income for twenty-one years from the death of the testator. If at the end of this period the son has died leaving two infant children aged eight and two, accumulation may continue, under the provisions of Trustee Act 1925 s.31, for the remainder of the childrens' minorities notwithstanding that the permitted accumulation period directed under s.164 has expired.[99]

(e) Pension schemes

3.32 It is not entirely certain whether the statute would apply to pension schemes, although by analogy with principles applied to unit trusts[100] it is suggested that the statute ought to be of no application. The Attorney-General indicated during the Third Reading of the Bill preceding the 1964 Act that the statutory rule was not intended to apply to pension schemes.[101]

3.33 Further, to the extent that under a company pension scheme the company can be said to be the settlor or disponor, the rule can have no application. In *Re Dodwell & Company Limited's Trust*,[102] a case concerning an employees' trust of which the company employer was the settlor, Walton J. held that it could not apply because "person" in that section referred only to individuals and not to a corporate settlor, which was able to direct accumulations free from any time limit imposed by that section.

(f) Certain commercial contracts

3.34 In *Bassil* v. *Lister*[103], a testator directed his trustees to pay the premiums on a policy of insurance which he had effected on the life of his son out of the rents and income of his residuary estate. It was argued that this was an indirect method of accumulation as the life insurance company would be accumulating the premiums on behalf of the sons. Turner V-C held that this was not an accumulation within the Thellusson Act. The reasons were threefold: first, the Act had its "origin in dispositions for the accumulation of rent and profits qua rents and profits, and not in dispositions having any reference whatever to bargains or contracts entered into for other purposes than the mere purpose of accumulation";[104] secondly, the premiums become mixed with other premiums so they become the property of

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[99] *Re Maber* [1928] Ch. 88.

[100] Para. 3.35 below.

[101] *Hansard* (H.C.), 1 July 1964, vol. 697, cols. 1503-4. Following *Pepper* v. *Hart* [1992] 3 W.L.R. 1032, the courts may take account of clear ministerial statements as an aid to construing ambiguous legislation. However, it is arguable that the statement would not be taken into account in a judicial determination of the question, since the Attorney-General was stating his opinion of the effect of the Law of Property Act 1925 s.164, rather than indicating the intended scope of the 1964 Act.

[102] [1979] Ch. 301.

[103] (1851) 9 Hare 177.

[104] *Ibid.*, at p. 181.

the insurers and it is impossible to say which premium has provided which accumulation; and thirdly, the Thellusson Act's provision that "no person or persons shall ... settle or dispose of any real or personal property" did not have any application to commercial situations. As already noted,[105] doubt has recently been cast on this decision. The argument that the trustees were being directed to apply income on a capital expense and so were being directed to accumulate income was never put to Turner V-C.

3.35 However, as a general proposition Turner V-C's third reason would appear to be correct. He also alluded to other matters that in his view would not be included within the compass of the Act. These were partnership agreements for long terms of years; life insurance policies on the lives of debtors; and a settlement of insurance policies with shares transferred to pay the premiums out of the dividends.[106] Analogous matters have since come before the courts and have been similarly dealt with. In *Re AEG Unit Trust (Managers) Limited's Deed*,[107] a trust deed provided that the balance of the net income of a unit trust fund after a distribution was made should be added to the capital. The question was whether the rule against excessive accumulations was applicable. Wynn-Parry J. treated the matter as being governed by the reasoning in *Bassil* v. *Lister*. He gave as an alternative ground the fact that if all the unit trust holders wished to end the trust, they could do so, or even, in any year, they could ask for all the income to be distributed and not added to capital.[108]

3.36 Further, many commercial contracts of this nature will be effected by corporate settlors. These will come within the exception to the rule in *Re Dodwell & Company Ltd's Trust*.[109]

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105 Para. 3.7 above.

106 *Bassil* v. *Lister*, (1851) 9 Hare 177 at p. 184.

107 [1957] Ch. 415.

108 *Ibid.*, at p. 422.

109 Para. 3.33 above.

PART IV

CRITICISMS OF THE PRESENT LAW

4.1 In this Part of the Consultation Paper we consider the defects of the rules against perpetuities and excessive accumulations. Part A concerns perpetuities and Part B accumulations.

A. THE RULE AGAINST PERPETUITIES

4.2 Whilst the 1964 Act has undoubtedly been successful in curing many of the problems of the common law rule against perpetuities,[1] there nevertheless remains a range of grounds on which the present law may be criticised. We welcome views on the extent to which the points made below are justified. Each of these criticisms will be looked at in detail, under the following headings:

(a) complexity;
(b) uncertainty;
(c) inconsistency;
(d) interference with commercial transactions;
(e) harshness;
(f) lack of adaptability;
(g) expense.

(a) Complexity

4.3 The principal reasons for the complexity of the rule against perpetuities are as follows:

(i) the interaction of the common law and the 1964 Act;
(ii) the existence of three perpetuity periods;
(iii) the 1964 Act and other statutes relating to the rule.

(i) Interaction of common law and the 1964 Act

4.4 A working knowledge of both the common law rule and the 1964 Act is needed in applying the rule against perpetuities to dispositions, whether they were made before or after the 1964 Act came into force. In the case of pre-1964 Act dispositions, the common law rule continues to apply since, subject to one exception, the 1964 Act was not retrospective.[2] The

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[1] There have only been two reported cases concerning the 1964 Act since it came into effect. In addition solicitors' firms who responded to our enquiries generally indicated that the Act had alleviated problems.

[2] See paras. 2.2 and 2.3 above. Consideration was given to the question of retrospectivity of amendments to the common law rule against perpetuities in paras. 63-67 of the Fourth Report of the Law Reform Committee (1956), Cmnd.18.

number of such dispositions in effect, although diminishing, still remains significant,[3] and perpetuity problems may arise in relation to a contingent interest many years after its creation. In most cases the common law rule alone will apply, but the 1964 Act applies where the disposition has been varied by a deed or court order since that Act came into force.[4] The 1964 Act similarly applies where a general power of appointment has been exercised on or after 16th July 1964 even if the power was created before that date; however, the common law rule applies to a special power in those circumstances.[5] As regards post-1964 Act dispositions, knowledge of the common law is still needed to determine the validity of an interest notwithstanding the introduction of the simple s.1(1) period, since "wait and see" can only be invoked once it has been established that an interest is void for perpetuity at common law. In addition, since the 1964 Act operates largely by way of amending the common law rule, familiarity with the common law is essential in order fully to understand the Act.

4.5 As a result of the "wait and see" provisions in the 1964 Act operating by way of amending the common law, certain aspects of the common law and the provisions of the 1964 Act, whilst ostensibly similar, have subtle differences which contribute to the overall complexity of the rule. For example, we have discussed the distinction between the approaches of the common law and the 1964 Act to the unborn widow situation and to lives in being.[6] Even to an experienced practitioner the distinction may not be immediately apparent.[7] "It makes no sense to have two different rules applicable to any limitation, based on different principles, and measured by different lives."[8]

(ii) Existence of three perpetuity periods

4.6 The rule would no doubt be simpler to apply if the three perpetuity periods were replaced by one. However, the periods in sections 1(1) and 9(2) of the 1964 Act are relatively simple. Furthermore, problems which have been suggested regarding the identification of lives in being may be more theoretical than practical. Where there is a royal lives clause it is necessary to maintain a record of lives in being,[9] but this task is assisted by reference books. We have been told of problems arising in recent years in relation to clauses in dispositions made before the First World War which refer to the lineal descendants of Queen Victoria. King Olav V of Norway was one such descendant and, prior to his death in 1991, it was known that any such dispositions made since his birth in 1903 remained valid; now, however, the remaining descendants born in the early years of the twentieth century are

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3 This is the experience of several of the firms of solicitors whom we have consulted on this issue.

4 As, for example, in *Re Holt's Settlement* [1969] 1 Ch 100.

5 Part II, para. 2.54.

6 *Ibid.*, para. 2.10.

7 *Ibid.*, paras. 2.21-2.27.

8 Maudsley, *The Modern Law of Perpetuities* (1979) p. 109.

9 What is relevant, of course, is who, of the defined class, still survives from amongst those who were alive on the day the settlement happened to have been created.

somewhat obscure German princelings, making it difficult for practitioners to keep aware of whether any descendants remain alive.[10] However, it seems likely that dispositions with such clauses are no longer commonly found, since from several years before the 1964 Act came into force the standard form of royal lives clause referred to the descendants of George V. In any event most modern settlements are designed to come to an end before the end of the specified period, so that it is rarely necessary to know the exact date upon which the 21 years from the death of the last royal survivor occurs.

4.7 Greater difficulties may arise in measuring the perpetuity period where the statutory lives in being listed in ss.3(4) and (5) of the 1964 Act are being applied. Morris and Wade have described these subsections as being "of formidable complexity".[11] The main problems are discussed below, under the heading of uncertainty.[12] However, there is only one reported case concerning these provisions,[13] which may mean either that this period is rarely used or that the possible pitfalls have been overcome by practitioners. Or, possibly, challenges have yet to be made. We would particularly appreciate receiving consultees' experiences on this matter.

(iii) The 1964 Act and other statutory provisions

4.8 The 1964 Act is complex in itself. While we appreciate the pragmatic grounds which required the Act to operate by way of amending the common law, the result in some cases is that the amendments perpetuate and increase complexities of the common law. For example, the age reduction rules in s.4 increase complexity since they do not reduce the age at which an interest is stipulated to vest to 21 for all purposes,[14] and further complications arise where a disposition is contingent on more than one child attaining an age exceeding 21. Difficulties also arise with other statutory provisions which impinge upon the rule against perpetuities. For example, the Social Security Act 1973, s.69, as amended, exempts certain pension schemes from the rule against perpetuities, but invoking this section is made complex by the wide range of conditions to be satisfied.[15]

(b) Uncertainty

4.9 Much of the uncertainty of the common law was addressed by the 1964 Act, but in some respects that Act has in turn created fresh uncertainties. Perhaps the greatest difficulties have arisen in interpreting subsections 3(4) and (5), which list the statutory lives in being for the purpose of the "wait and see" provisions. The main problems have been identified as follows:

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[10] This difficulty has been pointed out to us by a firm of solicitors.

[11] Morris and Wade "Perpetuities Reform at Last" (1964) 80 L.Q.R. 486 at 501.

[12] Para. 4.9.

[13] *Re Thomas Meadows and Co Ltd. and Subsidiary Companies (1960) Staff Pension Scheme Rules* [1971] Ch. 278.

[14] See Part II, paras. 2.36-2.37.

[15] Part II, paras. 2.67-2.69.

(i) One gift can contain different types of dispositions. The gift has to be split into the separate dispositions so that the appropriate lives in being for each one can be determined.[16] There can be difficulties in determining what is a disposition,[17] as illustrated by *Re Thomas Meadow & Co. Ltd. and Subsidiary Companies (1960) Staff Pension Scheme Rules*.[18]

(ii) Where the second part of s.3(4)(a) is applicable, it is unclear which lives should be disregarded.[19] For example, "lives of any description of persons"[20] could mean lives in being falling within one category of s.3(5)(b) or all lives in being falling within all the categories in s.3(5)(b). When there are persons who are lives in being in accordance with ss.3(5)(b) and 3(5)(c) the phrase could mean that the persons to be disregarded are only those who are described in s.3(5)(c). In *Re Thomas Meadows and Co.Ltd and Subsidiary Companies (1960) Staff Pension Scheme Rules*[21] Goff J. considered that persons within s.3(5)(b)(iii) were the appropriate lives in being for the disposition in question but that it made s.3(5)(c) impracticable.[22] He therefore disregarded the persons who were lives in being in accordance with both of these subsections and decided that the persons who were lives in being were those who came within s.3(5)(d).

(iii) Whilst it is certain that the donee of a power, option or other right is a life in being in accordance with s.3(5)(b)(v) of the 1964 Act for the purposes of determining whether or not a power is valid, it is unclear whether such a person is a life in being for the purpose of determining the validity of an exercise of the power. Sir Robert Megarry and Professor H.W.R. Wade[23] and Professor Maudsley[24] adopt contrary views. *Halsbury's Laws of England*[25] suggests that the better view is that the donee of the power is a life in being for both purposes.

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16 See Megarry and Wade, *The Law of Real Property* (5th ed., 1984), pp.256-7 and Maudsley, *The Modern Law of Perpetuities* (1979), p.135.

17 S.15(2) of the 1964 Act defines "disposition" as "[including] the conferring of a power of appointment and any other disposition of an interest in or right over property...". See also s.15(6) of the 1964 Act.

18 [1971] Ch. 278, at pp. 282-3.

19 See Maudsley, op. cit., p.128 and Cheshire and Burn *Modern Law of Real Property* (14th ed. 1988) pp.309-310.

20 1964 Act, s.3(4)(a).

21 [1971] Ch. 278.

22 *Ibid.*, at p.285.

23 See Megarry and Wade, op. cit., p.283, and Cheshire and Burn, op. cit., p.308.

24 See Maudsley, op. cit., pp.133-6.

25 (4th ed., 1981) vol. 35, para. 911, n.17.

(iv) There is an ambiguity in section 3(5)(c) of the 1964 Act. This subsection includes as a statutory life in being a person whose child or grandchild, "if subsequently born, would by virtue of his or her descent" become a beneficiary. The words "would by virtue of his or her descent" are capable of two different interpretations. They could refer to the parent or grandparent of the subsequently born child, and be intended to impose an extra requirement which that person must satisfy in order to be a life in being in accordance with the subsection. Alternatively, they could refer to the subsequently born child, who will be a beneficiary. The latter view, which is favoured by Professor Maudsley, seems more likely to accord with the intended meaning of the subsection.[26]

4.10 A further area of uncertainty is how the age reduction rules in s.4 operate where a disposition is contingent on more than one child attaining an age exceeding 21.[27]

(c) Inconsistency

4.11 There are a number of ways in which the rule against perpetuities operates inconsistently in different circumstances. The common law and the 1964 Act are not consistent in their approaches to the identification of lives in being for the purpose of measuring the perpetuity period.[28] For example, where an easement is granted to use drains "hereafter to pass" under the grantor's land, neither the grantor nor the grantee are relevant lives in being at common law because their lives do not govern when the drains will be built.[29] But where the 1964 Act applies the grantor and grantee will be lives in being under s.3(5)(a) and (v).

4.12 The Law Reform Committee noted difficulty in finding any clear guiding principle in the exceptions to the rule against perpetuities.[30] For example, where the common law alone applies, options to renew a lease are exempt but options to purchase a freehold reversion are not. In addition, a gift to a charity is not exempt, under either the common law or the 1964 Act, whereas a gift over from one charity to another is.

(d) Interference with commercial contracts

4.13 One of the original purposes of the rule against perpetuities was to prevent a settlor or testator from being able to ensure that property was kept in his family for ever.[31] As it developed its application was not restricted to family settlements, but extended to all contingent interests in property. Its application today to commercial interests such as pension

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[26] The possible interpretations of those words are set out in detail in Maudsley, op. cit., pp.131-133.

[27] See paras. 2.36-2.37 above.

[28] For discussion of the divergence of the 1964 Act from the common law in this respect see Megarry and Wade, op. cit., pp.256-258.

[29] See para. 2.22 above.

[30] Fourth Report of the Law Reform Committee (1956), Cmnd. 18, paras. 61 and 62.

[31] See Part V, paras. 5.12-5.16.

schemes and options creates a number of problems. First, where the fixed perpetuity period in section 1(1) of the 1964 Act is not applicable,[32] the perpetuity period of a life in being plus 21 years is not always easy to apply to a contingent interest in commercial property. There are sometimes no lives in being in relation to these interests and the perpetuity period is therefore only 21 years.

4.14 Secondly, it may seem that the rule unnecessarily interferes with parties' freedom to contract, particularly where they are likely to have equal bargaining power. Where complex developments take place developers may want to grant easements to take effect many years in the future, but the time within which the easements are to take effect must be restricted to the perpetuity periods. Restrictions of this nature may be thought to serve little purpose. The rule may similarly be thought unnecessarily to interfere with grants of options to extract minerals from land. Such options are required by the rule to be exercised within 21 years, notwithstanding that it may suit the commercial needs of both parties for them to be capable of being exercised beyond this period.[33]

(e) Harshness

4.15 It is arguable that harsh consequences may result from a violation of the rule. An interest which infringes the rule is completely void and the disposition containing it takes effect as if that interest did not exist. This may be harsh in the case of testamentary dispositions, in that the interest may devolve upon persons whom the testator did not want to benefit. The testator's intentions are violated and the court is effectively writing a new will.[34] The greatest harshness may occur where the common law rule alone applies and intentions are thwarted where interests are rendered void for perpetuity, which, if they had been valid, would actually as circumstances transpire have vested within the perpetuity period. The same occurs with inter vivos dispositions, although any harshness may be mitigated by the disponors having another opportunity to dispose of their property as they intended. We would appreciate hearing of any practical situations which consultees have encountered where harshness of this kind has arisen as a result of applying the rule.

(f) Lack of adaptability

4.16 The 1964 Act modernised parts of the rule but perpetuated the main principles of the common law rule which were formulated many years before. Age is not in itself a criticism of the rule, but twentieth-century legislation in many ways diminishes the importance of one of the rule's original purposes, the promotion of the alienability of property. The Trustee Act 1925 s.12 and the Settled Land Act 1925 s.38 confer powers of sale on trustees and tenants for life respectively. Land cannot therefore be said to be inalienable merely because it is held in trust until such time as the beneficiaries' interests vest. The idea of it being commonplace for landowners to wish to render their property inalienable appears to be old fashioned today, with the majority of testators only wanting to provide for their immediate family and perhaps

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[32] See para. 2.18 above.

[33] Both of these examples were given to us in response to informal enquiries which we have made to firms of solicitors.

[34] See Morris and Leach, *The Rule against Perpetuities* (2nd ed., 1962) p.255.

the next generation. In addition, the rules do not fit in with our modern laws of taxation and they can interfere with legitimate tax planning.[35]

4.17 One particular example of the rule's lack of adaptability is in relation to problems brought about by advances in reproductive technology. We have seen that some of these issues are dealt with by the Human Fertilisation and Embryology Act 1990,[36] but the potential for other problems remains.[37]

(g) Expense

4.18 The rule against perpetuities increases the cost of drafting and implementing dispositions containing contingent interests in property or powers of appointment. Whilst every rule of law may occasion expense because of the need to ensure that the rule is complied with, the greater care required to be taken in drafting dispositions to comply with a complex rule, and the detailed study of existing dispositions to determine whether they are in breach, with the possible need to apply to the Court to decide the position in cases of uncertainty,[38] go to create excessive costs for parties.

4.19 Work is also generated where a disposition is found to violate the rules, or even where the expiry of a perpetuity period becomes imminent. It can, for example, become necessary to vary a trust, resettle property, reformulate a pension scheme or regrant an option.[39] Clients may wish the rules to be avoided. The consideration of possible avoidance measures incurs more expense. One of the main measures currently adopted is to set up trusts in other jurisdictions which leads to large sums of money being taken outside the United Kingdom and to the loss of the business which it generates.

B. THE RULE AGAINST EXCESSIVE ACCUMULATIONS

4.20 The Rule against Excessive Accumulations has been criticised for:

(a) complexity;
(b) uncertainty;
(c) inconsistency in its effect on dispositions;
(d) frustrating the reasonable wishes of settlors;
(e) applying to charitable trusts;
(f) not fitting well with other statutory provisions.

We shall proceed to analyse these criticisms.

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[35] Some of the respondents to informal consultation suggested that they had come across problems of this kind.

[36] See n.30 to para. 2.16 and n. 45 to para. 2.21 above.

[37] See para.5.79 below.

[38] This occurred in *Re Drummond* [1988] 1 W.L.R. 234.

[39] Some of these rearrangements were referred to by a few of the firms of solicitors whom we informally consulted.

(a) Complexity

4.21 The Rule against Excessive Accumulations has generated a large volume of case law. According to Morris and Leach[40] there were 180 reported cases on the Accumulations Act between 1800 and 1962; entirely out of proportion, they suggest, to the importance of the subject. Whilst there have been fewer cases since 1962, perhaps as a result of improved standards of trust drafting, litigation does seem to be generated as a consequence of the restriction of accumulation of income to a shorter period than the perpetuity period.[41] Clearly this occurs because having separate accumulation and perpetuity periods serves in itself to make the law complex.

4.22 The initial cause of complexity is the provision of six alternative accumulation periods, of which the settlor or testator must choose one.[42] In addition, there is the interaction with these six accumulation periods of the Law of Property Act 1925 s.165 and the Trustee Act 1925 s.31, which combine to permit successive accumulations in certain circumstances.[43]

4.23 A particularly complex area of case law is that dealing with the fundamental question of what is an accumulation within the meaning of the Act.[44] Numerous complicated distinctions are involved. An example is that between accumulation and retention of income for reasons such as uncertainty about the availability of assets (an example given by Russell L.J. in *Re Berkeley*[45]). Another is the distinction in *Vine* v. *Raleigh*[46] between improvements to property that would properly be defrayed out of income (the application of income to which does not constitute accumulation), and improvements which add to the property.

4.24 Also very difficult is the question of what is a portion for the purpose of the second statutory exception to the rule, within the Law of Property Act 1925 s.164(2). As Morris and Leach[47] point out, the courts have either declined to define the meaning of portions, or else have done so in language so vague as to make it impossible to extract any general principles.

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40 Op. cit., p.304.

41 An analysis of United States jurisdictions by Simes (Public Policy and the Dead Hand, p.208) suggests this to be true. During the period 1936 to 1954 thirteen states had statutes restricting accumulations to a period shorter than that allowed by the rule against perpetuities. The remaining thirty-seven states merely restricted accumulation of income to their perpetuity periods. Simes discovered that seventy-three cases concerning accumulations were heard in the states with separate accumulation periods, compared with only eight cases in all the other states.

42 See paras. 3.12-3.19.

43 See para. 3.31.

44 See paras. 3.2-3.8 above.

45 [1968] Ch. 744, 776.

46 [1891] 2 Ch. 13.

47 Op. cit., p.282.

(b) Uncertainty

4.25 The rule against excessive accumulations creates uncertainty. Case law has settled many problems, but not all, and on some points has developed complicated distinctions and interpretations. Statutory clarification would be desirable on a number of issues.

4.26 One area of uncertainty is the process of choosing an accumulation period where an instrument does not stipulate one.[48] The courts purport to determine the period in accordance with the settlor's intention as shown by the language of the instrument. It is, however, an artificial process when the settlor has not considered the rule against excessive accumulations and so cannot have intended to stipulate any particular period. The difficulty is shown by *Re Ransome*,[49] where Upjohn J thought that none of the available periods corresponded at all with the testator's intentions, and in choosing the second accumulation period to apply, said that he did not think it important whether that or the third period was chosen.

4.27 A second major area of uncertainty relates to the question of what transactions are excluded from the rule against excessive accumulations. *Bassil* v. *Lister,*[50] which held that a direction for life insurance policies to be paid out of the rents and income of property did not constitute an accumulation within the meaning of the Act, has been followed in a number of cases, including *Re AEG Unit Trust (Managers) Limited's Deed*,[51] which held that the Law of Property Act 1925 s.164 did not apply to a unit trust scheme. These cases seem to point towards a restrictive interpretation of s.164, but doubt remains as to the extent to which they may be authority for a more general proposition that commercial schemes are outside the scope of the rule.

4.28 Practitioners are particularly concerned to clarify whether pension schemes are outside the scope of the Act. Pension funds accumulate income throughout their duration in order to pay pensions, and if the rule against excessive Accumulations were to apply to them it would effectively limit their potential duration to the accumulation period. Many large pension funds have been excluded from the application of s.164 by the decision in *Re Dodwell and Co. Ltd's Trust*[52] that the section does not apply where property is settled or disposed of by a corporation, but this decision does not affect pension schemes which have been established by individuals and partnerships. It has been widely assumed that all pension schemes are outside the Act, chiefly in reliance on a statement to that effect by the Attorney-General on the Third Reading of the Bill preceding the Perpetuities and Accumulations Act 1964.[53] However, this clearly lacks legislative authority.[54]

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[48] See paras. 3.20-3.21.

[49] [1957] Ch. 348, 361.

[50] (1851) 9 Hare 177.

[51] [1957] Ch. 415.

[52] 1979 Ch. 301.

[53] *Hansard* (H.C.), 1 July 1964, vol. 697, cols. 1503-4.

(c) Inconsistency

4.29 The law is inconsistent as to the circumstances in which a flexible trust can continue to accumulate after the expiry of a fixed period, by reference to the available minorities of minor beneficiaries.[55] The question depends on the applicability of the Law of Property Act 1925 s.165 and the Trustee Act 1925 s.31, the combined effect of which is that where a beneficiary is a minor when the directed accumulation period expires, accumulation may continue until the beneficiary attains the age of majority. These rules may in certain circumstances allow accumulation for lengthy periods; indeed, there is no reason why, if there is a sufficiently wide class of beneficiaries in whose favour a power of appointment is exercisable, there should not be accumulation using beneficiaries' minorities for the whole of the perpetuity period. This point was considered by the Law Reform Committee[56] which concluded that there was probably not sufficient mischief to call for any change in the law.

4.30 Other aspects of the rule which may be regarded as inconsistent are, first, that it applies to individuals but not companies[57] and, secondly, that it applies to funds which are accumulated to pay for improvements to property but not to funds retained to pay for repairs or to cover liabilities under covenants in leases.[58]

(d) Frustrating the reasonable wishes of settlors and testators

4.31 What constitutes a reasonable accumulation period is a matter of policy. As the Law Reform Committee[59] pointed out, one view is that a direction to accumulate is evil per se in that it enables a settlor or testator to starve the living in order to augment the fund for posterity. However, that is an extreme view,[60] and it is arguable that the shortness of the six accumulation periods permitted by s.164 (as amended) is such as to prevent what would generally be regarded as reasonable directions to accumulate from having effect.[61]

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54 It is doubtful whether *Pepper* v. *Hart* [1992] 3 W.L.R. 1032 would enable the statement to be considered as an aid to determining the matter: see n.101 to para. 3.32 above.

55 See para 3.31.

56 Fourth Report (1956) Cmnd, 18, para. 58.

57 *Re Dodwell and Co. Ltd's Trust* 1979 Ch. 301.

58 See para 3.6.

59 Fourth Report (1956) Cmnd, 18, para. 55.

60 Particularly now that the Inheritance (Provision for Family and Dependants) Act 1975 ensures that testators must make adequate provision for their immediate family.

61 For example, a number of firms of solicitors with wide experience of accumulation trusts,with whom we have consulted informally, are unanimously of the opinion that it would be reasonable to direct that income should be accumulated until beneficiaries (of whatever age, and whether born or unborn at the date of the disposition) attain the age of 25. We understand that settlors and testators are frequently unhappy that the law does not permit them to do this. On this, see further para. 6.25 below.

4.32 Consider, for example, the case of a settlor wishing to set up a trust for his young grandchildren. Such a settlor might often desire to postpone vesting of the fund in the beneficiaries until they attain an age such as 25, for reasons such as the following:

i) A belief that the beneficiaries should not become entitled to a private income until they have become sufficiently mature to use it responsibly - perhaps until they have completed their education and established themselves in a career.

ii) A wish to take maximum advantage of the provisions of the Inheritance Tax Act 1984 s.71. This confers a special status for tax purposes on accumulation and maintenance trusts (trusts of which the income may be used to maintain the beneficiaries, but otherwise is directed to be accumulated). The status is held so long as the beneficiaries come into interests in possession by the time they attain the age of 25, and provided that either the beneficiaries are all grandchildren of a common grandparent, or else not more than 25 years have elapsed since the commencement of the settlement.

4.33 As the law stands, accumulation until beneficiaries attain the age of 25 is only possible where they are aged four or over at the time when the accumulation commences, by directing accumulation for one of the 21 year periods (unless the settlor directs an accumulation for his own lifetime, which would be a gamble that few settlors might be expected to wish to take). Thus if accumulation commences when the beneficiaries are aged four and one, it must cease when the younger one is aged 22. If the disposition includes unborn beneficiaries, accumulation must cease at a still earlier age, potentially as low as age 18. It may be thought harsh that the accumulation periods are too short to allow even such modest accumulations as are necessary to take full advantage of the taxation provisions for accumulation and maintenance settlements, although the advantage is gained for the period that accumulation is permitted. One might alternately take the view that the tax advantages of accumulation and maintenance settlements should be irrelevant to the determination of what, as a matter of policy, should be the length of the accumulation period for the purpose of the law of trusts.

4.34 A further situation in which the law appears unduly harsh and to operate contrary to a testator or settlor's wishes is where a direction to accumulate is entirely void for exceeding the perpetuity period. "Wait and see" does not apply in this situation;[62] there appears to be no good reason why this should be so.

(e) Applying to charitable trusts

4.35 It is questionable whether there is any merit in the Law of Property Act 1925 s.164 applying to charitable trusts. It would doubtless be more convenient for charities and would ease their administration if they were able to retain surplus income outside the accumulation period, if only on a short term basis, where such retention was not inconsistent with their charitable status. It is our understanding that in practice surplus income outside the accumulation period can often be retained for short periods, for instance for the purpose of

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[62] See Maudsley op. cit., pp.207 - 208.

building up a capital fund, without revenue objection.[63] However this is merely a concession without any legal foundation.

(f) Not fitting well with other statutory provisions

4.36 Any number of years stipulated as a maximum accumulation period will be arbitrary. However, there was some cohesion in the scheme of the rule when the choice of accumulation periods was between various periods of 21 years and various periods of minority, since the age of majority was formerly 21. Since the reduction of the age of majority to 18 by the Family Law (Reform) Act 1969,[64] the references to 21 years contained in two of the periods (21 years from the death of the grantor, settlor or testator; and 21 years from the making of the disposition) appear to lack rationale.

4.37 References to both 21 years and to periods of minority also do not fit very happily with s.71 of the Inheritance Tax Act 1984, concerning accumulation and maintenance trusts.[65] It seems unsatisfactory that s.71 allows and even encourages vesting to be delayed for up to 25 years, but that income cannot be accumulated for more than 21 years (or now 18 years if accumulation is by reference to the period of minority).

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63 Our informal enquiries of firms of solicitors suggest that this practice occurs.

64 s.1.

65 This provision is outlined in para. 4.32 above.

PART V

OPTIONS FOR REFORMING THE RULE AGAINST PERPETUITIES

Introduction

5.1 The Commission has the choice of recommending one of the following courses of action in relation to the rule against perpetuities:

(1) do nothing;
(2) abolish the rule without replacing it;
(3) replace the rule with a new rule performing its policy functions;
(4) reform the rule with a view to addressing the main criticisms of it.

5.2 It will be apparent from the discussion which follows that the existence of a rule against perpetuities has significant social and economic consequences, as well as purely legal ones. We refer to these matters, but do not attempt in this paper to consider in detail the social and economic effects which abolition or reform of the rule would have. Such a task would be of doubtful validity as those effects would, necessarily, be very long-term ones. For example, if the rule were abolished, it might be a century or more after abolition before any effects on the distribution of wealth started to become noticeable. It might indeed not be practicable, especially given the short term nature of modern economic planning, to attempt to predict the economic effects with any degree of accuracy. Nevertheless, the importance of these considerations should not be overlooked, and we therefore particularly invite comments on the economic and social aspects of our options, in addition to the strictly legal issues that are raised.

Retrospectivity

5.3 Before discussing each of the above options we consider the question, of importance with respect to Options (2), (3) and (4), whether any reforms should be enacted retrospectively, or in respect of new dispositions only.

5.4 If the recommendation is to abolish or reform the rule against perpetuities, or to replace it with a new rule, then there is some attraction in recommending that the legislation to bring this about should have retrospective effect.[1] If it is made unnecessary to apply the current law even to dispositions made before the date that new legislation comes into force, the old law will immediately become obsolete rather than remaining in force for many years. To enact recommendations with retrospective effect would thus make it possible to simplify this area of the law to a much greater extent.

5.5 Conversely, the far from ideal result of introducing any reforms that are solely prospective is that three perpetuities regimes will thenceforth simultaneously be in existence:

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[1] The possibility of giving retrospective effect to reforms was discussed in detail by the Law Reform Committee in relation to their recommendations for amending the common law rule: see the Fourth Report (1956), Cmnd. 18, at paras. 63-67.

the common law will continue to apply to dispositions contained in instruments made before 16 July 1964; the common law as amended by the 1964 Act will apply to dispositions made after 15 July 1964 and before the date that the proposed reforms come into effect; and either the common law as further amended or, as the case may be, new statute law which supersedes it, will apply to dispositions made after the date of the proposed enactment coming into force. Even abolition without retrospective effect would leave intact the two present sets of rules. This consequence severely limits the extent to which it is possible to achieve simplification of perpetuities law by introducing new prospective reforms.

5.6 A possible difficulty may exist with retrospective legislation in that it affects property rights. If a disposition is void for perpetuity, the property disposed of is not *res nullius* but belongs to someone who takes because there is a resulting trust or because a subsequent interest is accelerated. Any legislation which retrospectively validated dispositions which are void for perpetuity under the present law would have the effect of depriving those who would have been entitled on default. It is arguable that legislation which did this could be liable to contravene the European Convention on Human Rights unless the interference with property was regarded as being justified and compensation was given to those persons who were deprived of their property rights.[2] But an alternative view, which we favour, is that interests of this nature would not be regarded as within the scope of Article One. But further, having regard to *James* v. *United Kingdom*,[3] we consider that any new legislation would fall within the public interest exception contained in the Article.[4] Clearly, Parliament's decision to enact a new law would be predicated upon the view that the present law was unsuitable to the current needs of the country, for many of the reasons rehearsed in this paper. We invite the views of consultees on this issue.

5.7 The discussion of options for reform which follows is based on our provisional view that the European Convention does not prevent Parliament from enacting new legislation relating to the rule against perpetuities with retrospective effect.[5] However, it is necessary

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[2] Article 1 of the First Protocol provides, in summary, that no-one shall be deprived of his possessions except in the public interest or to secure the payment of taxes or other contributions or penalties. Factors which need to be considered when determining whether a reform of the rule may contravene the Article include:

(a) Whether a contingent interest in property is a possession.
(b) Whether the reform would have the effect of depriving a person of his possessions.
(c) Whether the deprivation is in the public interest.
(d) The appropriateness of the reform and the proportionality of its effects to the aims to be achieved.
(e) Whether compensation is given for the deprivation.

[3] (1986) 8 E.H.R.R. 123.

[4] It was stated in *James*, *ibid.* at paras. 46-47, that "[t]he Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation".

[5] Most legislation to reform the rule in other jurisdictions has applied only to instruments taking effect after the legislation came into force. An exception is Manitoba, where the rule has been abolished with retrospective effect, subject to a saving provision confirming acts by trustees and others in reliance on the rule against perpetuities prior to the date on which the legislation came into effect: see Perpetuities

in considering retrospective reforms to distinguish between reforms affecting vested interests and reforms affecting contingent interests. There would clearly be injustice, for example, in retrospectively validating an interest which was previously void for perpetuity, if to do so would deprive a taker in default in whom that interest has already vested. But there may be no such difficulty in cases where the interest of the taker in default remains a contingent one, particularly given that this will be a person whom the disponor did not intend to benefit. We would be interested to know whether consultees would support retrospective reform of the rule which only deprived persons of *contingent* interests in property.

OPTION 1: TO DO NOTHING

5.8 The force of the criticisms which we have noted[6] may be thought to provide a strong case for abolition or reform of the rule against perpetuities. In addition to this we consider below arguments of principle concerning the desirability of the rule.[7] These too lead us to the provisional view that the present law is not satisfactory and that reforms are called for.

5.9 Nevertheless, it is relevant, in relation to the practical operation of the rule, that there have been few reported cases concerning perpetuities in recent years.[8] On the face of it this suggests that trust lawyers are, in practice, sufficiently capable of operating the rule satisfactorily to render the need for reform on grounds of complexity rather questionable. However, it may be that there are other explanations for this lack of court proceedings, and this is a matter on which we would welcome more information. For instance, uncertainties regarding the rule may be resolved without resort to court proceedings. Disponors wishing to avoid the effects of the rule may remove funds to a jurisdiction which has a more lenient rule or no rule at all prior to settling property, or may vary the terms of a trust in order to extend the perpetuity period.[9] Furthermore, violations of the rule by existing dispositions may not yet have become apparent. Perpetuity problems often do not arise until many years after the original disposition took effect.[10]

5.10 Arguments of this kind were put forward by Professor Leach in advocating reform of the common law,[11] although a more recent article[12] suggests that in the United States the lack of reported cases does not in fact mask greater difficulties. Do consultees believe that

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and Accumulations Act, R.S.M., 1982-83, c 43, s.5(2).

6 See Part IV above.

7 See paras. 5.17 - 5.47 below.

8 There has been only one reported case in the last ten years concerning the provisions of the 1964 Act: *Re Green's Will Trusts* [1985] 3 All E.R. 455. *Re Drummond's Settlement* [1988] 1 W.L.R. 234 is the only case relating to the common law.

9 See para. 5.33 below.

10 For example, the Court of Appeal's decision in *Re Drummond's Settlement* was made in 1988, many years after the testator's death.

11 "Perpetuities Legislation; Hail Pennsylvania!" (1960) 108 U. Pa. L. Rev. 1124.

12 I.M. Bloom, "Perpetuities Refinement: There is an Alternative" (1987) 62 Wash. L. Rev. 23, 33-38.

the rule against perpetuities is working satisfactorily in practice, or is it their experience that problems are being stored up or that strenuous efforts are being made to avoid the rule?

OPTION 2: ABOLITION OF THE RULE

5.11 In this section we put forward and evaluate arguments for and against the abolition of the rule against perpetuities. We first place these arguments into context by briefly considering the reasons for having a rule against perpetuities.

(a) Functions of the rule against perpetuities

5.12 It has generally been said that the rule against perpetuities has two main functions: to curtail "dead hand control"[13] and to ensure that property is freely alienable.

(i) Curtailment of "Dead Hand Control"

5.13 The term "dead hand" was coined for these circumstances by Professor Simes.[14] He defined it as "the hand of the man who is continuing to control the devolution of his property after he is dead either by the terms of his will or by some other instrument which effectuates the same purpose."[15] It is argued that unrestricted dead hand control would be socially undesirable because wealth would then be controlled by the dead and not by the living. Living people can make decisions in accordance with current trends of thinking and the current state of the country and the world, a testator's decisions concerning the fate of his property are necessarily made in accordance with the views of society and the state of the country and the world at the time when he makes his will. If large amounts of property were controlled by the dead then the development of different and new forms of investment and of the property market could be stifled. Some view the rule against perpetuities as preventing excessive dead hand control and facilitating such development and economic growth.

5.14 Control of property by the "dead hand" may also be undesirable because it does not take into account the desires of succeeding generations. Decades after the testator's will takes effect or a settlement is made changes may occur which he had not, or could not have, predicted and which render his directions concerning his property wholly inappropriate. For example, illness in the family or a war which might make it prudent and even necessary for property to be disposed of and for funds to be used in a particular manner. Even without events of this kind, future generations may simply want to enjoy the property in a different way from the one set down by the testator. On one view, the rule against perpetuities attempts to strike a fair balance between, on the one hand, the right of the living, rather than the dead, to control property, and, on the other, the right of individuals to make provision

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[13] See Morris and Leach, *The Rule against Perpetuities* (2nd ed., 1962) pp.13-18; Maudsley, *The Modern Law of Perpetuities* (1979), pp.219-221; Simes, *Public Policy and the Dead Hand* (1955).

[14] Simes, *Public Policy and the Dead Hand* (1955). The Statutes of Mortmain had for centuries used the same expression, albeit in French, for the case where land was owned by a corporation or charity which might own land in perpetuity.

[15] *Ibid*, p.2. "Dead hand control" is considered in detail in Chapter III.

for those immediately succeeding generations for whom it is natural for them to wish to provide in the manner they think most beneficial.

(ii) Ensuring the alienability of property

5.15 There are a number of reasons why it has historically been considered important for property to be alienable.[16] First, the ability to dispose of property gives the person who currently enjoys it the full benefits of ownership, which include the liberty to change investments, if not also to liquidate his holdings. Transfer of property can have beneficial effects on the economy by giving different people an opportunity to invest in property and encouraging an active property market.

5.16 Secondly, if land remains in the ownership of one family for generations there may be periods when lack of interest in its development or lack of funds can lead to its deterioration. As an asset it becomes unproductive and instead of it being of benefit to the public it may become a nuisance. If it is sold, the new owner is likely to take a fresh interest in it and endeavour to put it to good use. Similarly, the sale of an item of personalty, such as a valuable painting, might be preferable to its retention in the family if the latter means that it cannot be restored due to lack of funds and will be allowed to deteriorate.

(b) The case for abolition of the rule

5.17 It may be argued in favour of abolition of the rule against perpetuities that the policy functions of the rule are no longer important, that the rule is no longer essential to their fulfilment, that the rule is an unnecessary restriction on the free right to dispose of property or that abolition of the rule would be justified by the simplification of the law relating to future interests which would result. In this section we evaluate these arguments.

No need for a rule against perpetuities

5.18 As we have seen, the principal justifications for having a rule against perpetuities are to restrict dead hand control[17]and to promote alienability of property. But the relevance of these objectives must be considered in the context of modern social conditions. The importance of landed estates and family dynasties in English society has diminished compared with earlier centuries, as ownership of property is now more widespread.[18] Most individuals are likely to be concerned that on their death they should benefit their immediate family and grandchildren rather than considering future generations. Settlors contemplating the creation of trusts with remote interests, following the abolition of the rule, would still face the tax and practical disadvantages of such dispositions, and practitioners of whom we made inquiries indicated that they thought it unlikely that many would choose to ignore such advice in the

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[16] A full discussion of alienability is contained in Simes, op. cit., Chapter II.

[17] See paras. 5.13-5.16 above.

[18] See A.W.B. Simpson, *A History of the Land Law* (2nd ed., 1986), pp.237-9 and D. Sutherland, *The Landowners* (2nd ed., 1988) pp.117-8.

context of family settlements. If that is the case then it seems doubtful whether the economic benefits of alienability of property[19] would be lost by abolition of the rule.

5.19 It must be considered whether there would be other economic effects of abolishing the rule. One suggestion is that the growth of an economy may be stifled if large amounts of property are held on trust for long periods, and the rule against perpetuities plays a part in avoiding this by requiring vesting to take place within a restricted period, and thus helping to promote absolute ownership. The rationale behind the argument is that trustees of property subject to contingent interests are prevented by their fiduciary position[20] from taking actions involving the degree of risk an absolute owner might consider appropriate, and therefore a lack of risk investment in the economy may develop. But the validity of this view seems limited, as any disadvantages arising from trustees' lack of plenary powers is likely to be counterbalanced by their greater expertise in dealing with property and investments than many absolute owners, since they are often professional persons or financial institutions. Further, the modern tendency is to make trusts as flexible as possible so that trustees can accommodate changes, for example in tax legislation, and seize investment opportunities which the testator or settlor could not have foreseen.[21] Abolition of the rule against perpetuities would be consistent with this.

5.20 One view, therefore, is that the desire to tie up property for excessively long periods was a social evil of a bygone age, and that nowadays the absence of a rule against perpetuities would have no harmful effect in terms of rendering property inalienable or allowing dead hand control to be exerted to an unacceptable extent.

5.21 It is also arguable that the wide range of types of trusts which are exempted from the rule against perpetuities serves to diminish any justification for retaining the rule. In particular, regulations exempt many pension schemes from the rule, and there are strong arguments that the rule ought not to apply to any pension schemes.[22] The arrangements for pensions and the trusts involved are such a significant part of the modern law of trusts that it could be said that if the rule against perpetuities does not make sense for them, then that is a reason for its abolition. Similarly, the well-established exception for charitable trusts[23] has the effect of taking "a sizeable proportion of the country's economic activity"[24] outside the scope of the rule against perpetuities, which is again an argument against retaining the rule."

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19 Paras. 5.15, 5.16.

20 For a brief outline of the powers and fiduciary duties of trustees see Hanbury and Martin, *Modern Equity* (14th ed., 1993), Chapters 19 and 20.

21 It is common for trust instruments expressly to confer upon trustees powers of investment which are wider than those set out in the Trustee Investment Act 1961: see *Encyclopaedia of Forms and Precedents* (4th ed., 1971), Vol. 20, p.599, Form 1:F:9.

22 Paras. 5.81 - 5.82 below.

23 See paras. 2.64-2.66 above.

24 The Annual Report of the Charity Commissioners 1992, p.1 which refers to the current estimates of charitable turnover being £16 to £17 billion a year.

5.22 The position in Scotland may be noted. A rule against perpetuities has never existed there at common law, and perpetuities do not appear to have been regarded as a problem.[25] The social and economic position in Scotland may well be more closely analogous to England and Wales than in other common law countries which have the rule.[26]

Performance of functions by other rules of law

5.23 The case for abolition of the rule against perpetuities is strengthened if other rules of law successfully perform the functions of curtailing dead hand control and ensuring the alienability of property . We now consider whether that is the case.[27]

(i) STATUTORY POWERS OF SALE

5.24 In principle trustees, other than trustees for sale, cannot freely sell trust property unless expressly or impliedly permitted by the trust instrument, as that conflicts with their primary duty to preserve the property for the benefit of the beneficiaries. However, this rule is largely modified by statute in the cases of both realty and personalty. In the case of settled land, the Settled Land Act 1925[28] confers the power of sale on the tenant for life.[29] Where land is held on trust for sale the trustees are under a duty to sell the property,[30] the beneficiaries of the contingent interests having equitable interests in the land which are overreached on the sale and become attached to the proceeds of sale.[31] In the case of personalty too, statutory authority often empowers trustees to sell the trust property. For example, where a power to invest is conferred upon trustees by the Trustee Investment Act 1961, this implies a power to sell in order to make the investment.[32] Another example is the power of sale conferred upon trustees by the Trustee Act 1925[33] to raise the money

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25 See, for example, *Suttie* v. *Suttie's Trustees* (1846) 18 J. 442, 445. Some statutory controls do exist in Scotland which may have the effect of restricting the creation of perpetuitous interests. With regard to land, the creation of entails has been prohibited by the Entail Amendment Act 1848, s.47, and for both real and personal property a series of Acts have made it impossible to create a series of liferents.

26 Paras. 5.37 below.

27 Paras. 5.39-5.43 below discuss some possible restrictions on the success of these rules in performing such functions.

28 S.38.

29 Thus it has been said that the "strict settlement" ceased in reality to be strict in 1877 when such legislation was first enacted.

30 Under the Law Commission's proposed introduction of trusts of land to replace strict settlements and trusts for sale, trustees will generally have the powers of absolute owners: see Law. Com. 181, *Transfer of Land : Trusts of Land* (1989), para. 10.4.

31 Law Property Act 1925 s.2(1)(ii). The duty to sell is subject to a power to postpone sale.

32 *Hume* v. *Lopes* [1892] A.C. 112, dealing with a similar provision in previous legislation.

33 S.16(1).

required whenever a trust instrument authorises them to pay or apply capital money for any purpose.

5.25 Even though these statutory powers of sale are not duties, and thus trustees do not have to exercise them, the practical reality is that frequent use is made of them. As Underhill & Hayton[34] remark, they cover so many cases that it is perhaps more accurate nowadays to regard the trustees' duty to preserve the trust property "as a duty to preserve the value of the trust property vested in them." In consequence, it is arguable that settled property would rarely be rendered inalienable if the rule against perpetuities did not exist.[35] In one sense powers of sale achieve this more effectively than the rule, because they permit alienation from the time when the settlement is created and not merely after a period of time has elapsed.

(ii) TAX LEGISLATION

5.26 Tax legislation can indirectly restrict "dead hand control" and discourage lengthy trusts, and it may be argued that its impact renders the rule against perpetuities unnecessary.[36] Settlements have been generally subject to estate duty, capital transfer tax or inheritance tax ever since the Finance Act 1914, and these taxes have affected the number, type and length of settlements which have been made. Fixed settlements have been unpopular during this time because of generally unfavourable treatment by these taxes.[37] Discretionary trusts were formerly more popular[38] as estate duty was not payable where a settlement was made inter vivos and the settlor lived for at least seven years after the creation of the settlement.[39] New taxes on discretionary trusts were introduced by the Finance Acts of 1969 and 1975, and although the rate of taxation was reduced by the Finance Act 1982 the circumstances where it would be financially advantageous for a settlor or testator to create such a trust remain restricted.[40] These fiscal disincentives against the holding of property

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34 Underhill and Hayton, *Law Relating to Trusts and Trustees* (14th ed., 1987) pp.595-6.

35 In Wisconsin the courts have held that the rule against perpetuities does not apply if the trustee has an express or implied power of sale. That is not the position here.

36 The Law Reform Committee of South Australia believed the effect of modern tax laws to be that "[n]o-one in his sane senses would tie up property strictly for a life in being and twenty-one years thereafter" (73rd Report, *Relating to the Reform of the Law of Perpetuities* (1984), p.11), and placed considerable importance on this in recommending that the rule should be abolished. The Northern Ireland Land Law Working Group was sympathetic to this argument, considering that "it is a fact of life in the modern world that tax on the inheritance of property which, over a certain limit, is to a degree confiscatory is here to stay" (Final Report Vol. 1 (1990), para. 2.12.7). However, the Working Group reached the conclusion that it did not constitute a totally incontrovertible case for the abolition of the rule, which they felt would have to be made in order for them to be able to recommend abolition, given the rule's endurance through the centuries and its recent substantial statutory amendment.

37 See e.g. the comments contained in V.G.H. Hallett and N. Warren, *Settlements, Wills and Capital Transfer Tax* (1979), para. 2.02.

38 Before the Finance Act 1969.

39 *Tolley's Focus on Capital Transfer Tax: Discretionary Trusts after the Finance Act 1982* (1982), para.1.1.

40 Ralph Ray and John Redman, *Practical Inheritance Tax Planning* (1989), para. 4.6.

on fixed or discretionary trusts contrast starkly with the treatment of accumulation and maintenance trusts, which are a special form of accumulation trust applicable where the potential beneficiaries are children and certain conditions set out in the Inheritance Tax Act 1984 are satisfied.[41] Their use is encouraged by favourable inheritance tax treatment, and many have been created. They are of restricted duration,[42] so they constitute a major instance of tax legislation discouraging remoteness of vesting.

(iii) VARIATION OF TRUSTS

5.27 Dead hand control is curtailed by the ability of the living to vary settlements and wills. Trustees' powers[43] may be increased so that they are more in accord with those of an absolute owner, and adult beneficiaries who are sui juris can consent to a variation of a settlement which affect their contingent interests.[44] Where it is not possible for all beneficiaries to consent to a variation, for example where some beneficiaries are minors or are mentally incapacitated, the court may be able to consent to the variation on their behalf.[45] The most significant provisions giving the courts power to vary trusts are contained in the Variation of Trusts Act 1958. Where property is held on trust the Act gives the court a discretion to make an order approving on behalf of a list of persons "any arrangement varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property"[46] subject to them. The list includes unborn persons as well as living persons lacking the capacity to consent to a variation. However, before giving its approval the court must be satisfied that the arrangement would be for the benefit[47] of the person on behalf of whom it is consenting and that the arrangement is truly a variation and not a resettlement.[48]The courts have construed

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41 See s.71. The treatment of these trusts by inheritance tax is explained in detail in *Foster's Inheritance Tax* (1991), Division E5.31.

42 They must not last longer than twenty-five years unless all the beneficiaries are either of the same generation (i.e. with a grandparent in common) or are substituted children or spouses of deceased beneficiaries who were of the same generation: Inheritance Tax Act 1984, s.71(2).

43 Applications to the court to approve an arrangement to extend trustees' powers of investment were at one time rare since the court generally took the view that special circumstances had to be shown to justify an extension beyond the powers conferred by the Trustee Investments Act 1961. In the light of the restrictive nature of the powers conferred by the 1961 Act, it has been suggested that the number of applications of this kind have increased in modern times: see Hanbury and Martin, *Modern Equity* (14th ed., 1993) pp.606-607.

44 *Saunders* v. *Vautier* (1841) Cr. & Ph. 240. See Hanbury and Martin, *Modern Equity* (14th ed.,1993), p.599.

45 *Ibid.*, pp.601-617.

46 Variation of Trusts Act 1958, s.1(1).

47 This requirement does not apply in relation to a person who comes within the Variation of Trusts Act 1958, s.1(1)(d).

48 The distinction between an arrangement which varies a trust and one which is a resettlement may sometimes be a fine one: see *Re Ball's Settlement* [1968] 1 W.L.R. 899.

"benefit" widely,[49] but nevertheless it seems unlikely that they would consent to a variation which would deprive a beneficiary of his interest where the purpose of the variation is only to ensure that certain interests under the trust vest forthwith or within a specified period.[50] However, it is possible that if the rule against perpetuities were to be abolished the courts might take a less restrictive view of their duty, in the interests of the good administration of the trust.[51]

5.28 Other statutory provisions giving the court certain powers to vary settlements are contained in the Trustee Act 1925, s.57 and the Settled Land Act 1925, s.64(1). The Trustee Act 1925, s.57 gives the court a discretion to confer powers on trustees for the management and administration of trust property in certain circumstances. It does not extend to dealing with beneficial interests[52]. By contrast, the Settled Land Act 1925, s.64(1) permits the court to sanction a transaction regarding settled land or land on trust for sale which is for the benefit of the settled land or persons interested in the settlement provided it is one which could be effected by an absolute owner.

5.29 Abolition of the rule against perpetuities would increase the importance of the Variation of Trusts Act as a means of reforming capricious dispositions, and proposals to abolish the rule against perpetuities in other jurisdictions have all emphasised the wide powers of resettlement of trust property conferred by variation of trusts legislation in those jurisdictions.[53]

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49 In *Re Weston's Settlements* [1969] 1 Ch. 223, it was held that the court may consider social and educational benefits as well as merely financial benefits. Examples include the removal of a likely source of family dissension (*Re Remnant's Settlement Trusts* [1970] Ch. 560) and the moral disadvantage to young people of having access to large sums of money at too young an age (*Re Holt's Settlement* [1969] 1 Ch. 100).

50 In *Re Ball's Settlement Trusts* [1968] 1 W.L.R. 899, at p.902 C, Megarry J. stated:

> "I cannot see how it could be said that it is for the benefit of a person to destroy even the smallest hope of receiving a beneficial interest if nothing is put in its place."

This attitude is reflected throughout the case law, and the courts have consistently refused to ignore the claims of potential beneficiaries, however remote their chance of obtaining an interest: e.g. *Re Cohen's Settlement Trusts* [1965] 1 W.L.R. 1229; *Re Tinker's Settlement* [1960] 1 W.L.R. 1011. Where contingent interests have been destroyed, the court has insisted on sufficient compensation being paid: *Re Remnant's Settlement*, footnote 49 above. In *Re T's Settlement Trusts* [1964] Ch. 158 the court was prepared, reluctantly, to alter the date of vesting of a beneficial interest, but in that case no contingent interests were being curtailed by the scheme of variation.

51 Parker and Mellows, *The Modern Law of Trusts*, (5th ed.), 1983, p. 419, suggest that benefit in administration may count as "benefit" within the terms of s.1. It is not clear to what extent this would be permitted by the courts to counter-balance the detriment to beneficiaries deprived of their interests.

52 In *Anker-Petersen v. Anker-Petersen* (1991) 88/16 L.S. Gaz. 32, it was held that if the beneficial interests under a trust are unaffected, an application for the extension of investment powers is better brought under s.57 than under the Variation of Trusts Act, 1958. The advantages of s.57 include (e.g.) the absence of any requirement to obtain the consent of all adult beneficiaries.

53 In Manitoba the abolition of the rule was coupled with statutory amendment of the Trustee Act s.61, which is that province's variation of trusts legislation, to make it better fitted for the performance of this enhanced function. In paras.5.69 - 5.78 we consider the option of giving the court a cy-près power to reform dispositions which would otherwise be void for perpetuity.

(iv) THE INHERITANCE (PROVISIONS FOR FAMILY AND DEPENDANTS) ACT 1975

5.30 This Act gives the court powers which can restrict the "dead hand". Briefly, a deceased's spouse, child or other dependant may apply to the court for financial provision on the ground that the deceased's will failed to make reasonable provision for him.[54] If the applicant's claim is successful the court will order that he should receive reasonable financial provision out of the estate.[55]

Freedom of disposition

5.31 Property ownership normally includes a free right to obtain or dispose of the property or to dispose of it on terms. The rule against perpetuities interferes with this right and as we have discussed the interference may not be justified today. Abolition of the rule would promote the principle of the European Convention on Human Rights by removing a restriction on the way in which settlors and testators may dispose of their property.[56]

Simplification

5.32 A further argument in favour of abolition of the rule against perpetuities is that it remains so complex and problematic,[57] despite the changes made by the 1964 Act, that any public policy arguments against its abolition are outweighed by the benefits which would result from the simplification of the law. Indeed the very nature of a rule such as this is that it is difficult for all but the most subtle, imaginative and technically highly expert to apply. This increases the risk of mistakes being made, and the penalty for getting it wrong is that the settlor's intentions are defeated. With this in mind, it is a tenable view that the rule should be abolished unless a clear case can be made for its retention. Naturally this view will be further strengthened if the rule is failing in practice to operate satisfactorily for significant numbers of wills and settlements, and we invite evidence as to whether this is the case.

Avoidance of the rule

5.33 The case for abolition of the rule is further strengthened if disponors are able in practice to circumvent the rule. The effects of the rule may also be partially avoided by resettling property and, *Re Holt's Settlement*[58] suggests, by varying the trust pursuant to the Variation of Trusts Act 1958 to obtain a renewal of the perpetuity period. However, the ability to vary a trust may not be available in relation to certain interests, such as options. A settlor may attempt to avoid the rule by choosing a foreign law which has no perpetuity

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[54] Inheritance (Provision for Family and Dependants) Act 1975, s.1.

[55] *Ibid.*, s.2.

[56] In Marckx v. Belgium (1979) 2 E.H.R.R. 330 it was held that ".....the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property".

[57] See the criticisms in paras. 4.3-4.8 above.

[58] [1969] 1 Ch. 100.

rule to govern what is essentially an English trust.[59] However, the court may disregard the choice when its application would be manifestly incompatible with public policy.[60]

Abolition of the rule in Manitoba

5.34 The only common law jurisdiction to have abolished the rule against perpetuities is Manitoba.[61] This implemented the recommendation of the Manitoba Law Reform Commission,[62] whose major reasons for favouring abolition were as follows.[63] First, the number of resident or non-resident investors in the wealth of the province who would wish to create dynastic trusts was considered to be likely to remain so small, if they in fact existed, that there would not be a social, or economic problem. This view was supported by information which the Commission had received from consultation. Secondly, in the Commission's view the rule did not ensure that property was alienable nor prevent land being hoarded; it was trustees' powers to change investments, or to apply to the court for such a power if it was lacking, that met this problem. Thirdly, the argument that the rule restricted dead hand control held no force once the courts were given power to consent, on behalf of the incapacitated, the unascertained and the unborn to the variation or revocation of trusts.[64] To our knowledge there has been no reported case on the subject in Manitoba since the rule was abolished, nor any research on the effects of abolition.

(c) The case against abolition

5.35 The strongest reason against abolishing the rule against perpetuities would be that it continues to serve a useful purpose in modern society. We have already discussed reasons why it may not do so; here we consider some countering arguments.

Need for the law to curtail "dead hand control"

5.36 Whilst there is no proof that, in today's society, significant numbers of settlors or testators desire to retain property in their family for long or indefinite periods, one view is that it is natural that those who inherit estates or heirlooms which have been in the family for

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59 Under Article 6 of the Hague Convention on the Law Applicable to Trusts and on their Recognition, implemented by the Recognition of Trusts Act 1987, an express choice by the settlor of the governing law is permitted.

60 Article 18. This would enable the court to impose some limit on the freedom to choose the applicable law under Article 6: see Cheshire and North, *Private International Law* (12th ed., 1992), p.891.

61 Perpetuities and Accumulations Act, R.S.M., 1982-83-84, c.43. Abolition has also been recommended by the Law Reform Committee of South Australia (73rd Report, *Relating to the Reform of the Law of Perpetuities* (1984)) and the Law Reform Commission of Saskatchewan (*Proposals Relating to the Rules Against Perpetuities and Accumulations* (1987)), but to date these proposals have not been implemented.

62 Report No.49, *Report on the Rules against Accumulations and Perpetuities* (1982).

63 *Ibid.*, at pp.35-46 and 51-53.

64 Similar reasons were given for the recommendations to abolish the rule in South Australia and Saskatchewan . The South Australian Law Reform Committee also stressed the effect of tax legislation in deterring the creation of remote interests: see n.36 to para. 5.26 above.

generations, as well as those who would like to institute such a tradition, should wish to use trusts to ensure that the property does not leave the family. Even if only a few property owners hold that attitude, the practice might still be thought contrary to public policy for the reasons discussed above. This suggests that there may be a continuing need for some form of rule restricting remoteness of vesting.[65]

5.37 Since the 1964 Act was passed, the rule against perpetuities has been considered by law reform bodies in other common law jurisdictions, and with three exceptions they have rejected abolition of the rule as an option.[66] The primary justification for retaining the rule cited by the law reformers was that it continues to serve a valuable purpose in striking "a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy".[67]

5.38 We have seen that the only common law jurisdiction to have abolished the rule against perpetuities is Manitoba. But abolition there did not attain universal support[68] and it is too soon to tell whether its effects have been beneficial. As regards the application of the rule to land, it may be relevant that conditions there are very different from in England and Wales. First, it is a large territory with a relatively sparse population, so that land is not such a valuable and scarce commodity as it is in England, with the result that it is of less importance for public policy to require its alienability. Secondly, Manitoba does not have the same historical tradition of landed estates as England and Wales. In the United Kingdom landed estates still comprise a significant area[69] and the Inland Revenue estimate that nearly 70,000 discretionary and accumulation trusts are in existence.[70] Contrary to the view taken by the Manitoba Law Reform Commission of the position there, a number of the solicitors'

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[65] The Law Reform Committee in 1956 thought it obvious beyond the need for discussion that this was the case: Fourth Report (1956), Cmnd. 18, para. 4.

[66] See, for example, Alberta Institute of Law Research and Reform, *Report on the Rule Against Perpetuities* (Report No.6, 1971); Law Reform Commission of New South Wales, *Report on Perpetuities and Accumulations* (L.R.C. 26, 1976); Law Reform Commission of Tasmania, *Report and Recommendations upon Perpetuities and Accumulations* (Report No.34, 1983); Northern Ireland Land Law Working Group, Final Report Vol.1 (1990). In the United States, the rule against perpetuities was considered by the Commissioners on Uniform State Laws, who favoured retention of the common law (with amendments, including the introduction of wait and see) and its codification in statutory form. This led to the Uniform Statutory Rule Against Perpetuities (hereafter referred to as U.S.R.A.P.) being approved by the National Conference of Commissioners in 1986: see 8A U.L.A. (Supp. 1992), pp.342-384. Up to July 1991 it had been implemented in 16 states.

[67] See, e.g. Law Reform Commission of New South Wales, op. cit., para. 2.4, quoting from Morris and Wade "Perpetuities Reform at Last" 1964 80 L.Q.R. 486.

[68] The Manitoba Law Reform Commission's Report contains a Memorandum of Dissent by D. Trevor Anderson (at pp.62-65, *ibid.*), and its reasoning has been described by one commentator as "not totally convincing": see Jane Matthews Glenn, "Reform by Abolition in Manitoba" [1984] 62 Canadian Bar Rev. 618, 636-7. See also Deech, "The rule against perpetuities abolished" (1984) 4 O.J.L.S. 454.

[69] For example ducal estates in the United Kingdom comprised 158,000 acres in 1987 compared with 259,000 acres in 1877: see D. Sutherland, *The Landowners* (2nd ed., 1988), at pp.63 and 68.

[70] See the Inland Revenue Consultative Document, *Trusts: The Income Tax and Capital Gains Tax Treatment of UK Resident Trusts* (1991), para.2.6.

firms whom we informally consulted indicated that, in England and Wales, there remain many wealthy people who would be happy to take advantage of an abolition of the rule against perpetuities.

Limits to attainment of the policies by other rules

5.39 If the view is taken that the policy of the law should continue to be to restrict dead hand control and curb the inalienability of property, then it is relevant to ask whether the rule against perpetuities is necessary to achieve these purposes or whether it merely duplicates the effect of other rules of law whilst at the same time unnecessarily invalidating dispositions. We have discussed the extent to which the policy functions of the rule are performed by statutory powers of sale, tax legislation, powers to vary trusts and family provision legislation.[71] However, limits do exist to such duplication of the rule's functions, in the light of which it may be argued that whilst these separate provisions may all go some way to ensuring the alienability of property and restricting dead hand control, they do not achieve these policies sufficiently by themselves, so that a rule against perpetuities continues to be useful and necessary.

(i) STATUTORY POWERS OF SALE

5.40 As we have noted, statutory powers of sale only enable trustees and tenants for life to sell trust property; they do not mean that alienation will in fact happen. It may be that in some, or perhaps many cases, inheritors of family estates will use whatever pressure they can bring to bear on their successors to ensure that the estates do not leave the family, trusts for sale or Settled Land Act powers of sale notwithstanding. There is a statutory provision acknowledging that trustees for sale may need to obtain consents before selling.[72]

(ii) TAX PROVISIONS

5.41 Whilst tax legislation undoubtedly acts as a strong disincentive to tying up property for long periods, the desire of some settlors and testators to retain property in the family may be sufficiently strong for them to accept the erosion of the property by taxation as a price worth paying. Furthermore, tax provisions are always liable to change for reasons related to revenue raising rather than wider social considerations, so that it might be wrong to rely upon them for the indefinite regulation of property rights.

(iii) POWERS TO VARY TRUSTS

5.42 There is a wide ranging power to vary trusts, but it will only curtail dead hand control if it is used in practice. At present the power is rarely used other than by trustees or beneficiaries seeking to gain fiscal advantages from a variation. A court application is necessary, the expense of which has to be taken into account.

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[71] See paras. 5.23-5.30 above.

[72] Law of Property Act 1925, s.26.

(iv) FAMILY PROVISION LEGISLATION

5.43 Fourthly, in many cases where family provision legislation is successfully invoked, the effect on dead hand control may be minimal because in the case of large estates, which are of the greatest concern here, only a small amount of the estate may be required to provide for the individual and a large part of the settlement created by the will may remain intact.

European Convention on Human Rights

5.44 A theoretical argument which, if correct, would support the retention of the rule against perpetuities is that its abolition might contravene the right to peaceful enjoyment of one's possessions contained in the European Convention on Human Rights.[73] Abolition of the rule, otherwise than solely in relation to dispositions taking effect after the commencement of legislation, could result in persons being deprived of interests in property which were contingent on another interest being void for perpetuity.[74] However, we doubt whether such legislation would actually contravene the Convention because the European Court of Human Rights has generally shown willingness to accept the national legislature's judgement of what is in the public interest.[75]

Smooth operation of rule in practice

5.45 A further argument for the retention of the rule against perpetuities is that it is operating well in practice following the introduction of "wait and see". The criticisms can be seen as either more academic than practical, or in large measure only relevant in a sufficiently small number of "hard cases" to be of limited consequence.

(d) Summary

5.46 The principal arguments for abolition of the rule[76] are that its existence is inconsistent with principles of freedom of disposition and testation, that the rule is unnecessary in modern society since there is little desire on the part of property owners to tie up property for unacceptably long periods; that the policy functions of the rule insofar as they are necessary would be performed adequately by other existing rules of law, such as tax legislation and powers to vary trusts; that the effectiveness of the rule is in many cases limited since it can successfully be avoided; and that abolition may be justified by the simplification of the law which it would bring about.

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[73] Article 1 of the First Protocol.

[74] A contingent interest in property may not be a "possession" within the meaning of the Convention because it is not vested: for the factors to be considered in determining whether the Convention has been breached see n.2 to para. 5.6 above.

[75] See *James* v. *United Kingdom*, op. cit. at n.2 to para. 5.6 above.

[76] Paras. 5.17-5.33.

5.47 The main argument for retaining the rule[77] is that it serves public policy in preventing people from settling property for very long or indefinite periods, and that it gives due importance to the right of the living, rather than the dead, to control property. There are limits to the extent to which other rules of law would fulfil this function by themselves.

5.48 We have not yet reached a conclusion as to whether the case for abolition of the rule is sufficiently clear to justify this radical measure. We invite consultees to express their views on this question, and to comment on all the arguments which we have raised in this section.

OPTION 3: REPLACEMENT OF THE RULE AGAINST PERPETUITIES WITH A NEW RULE

5.49 If the view is taken that the functions of the rule against perpetuities need to be performed by a special rule, it nevertheless remains open to consider whether there might be better means of achieving this than the present rule directed against remoteness of vesting. We look at two possibilities:

(a) the introduction of a general rule limiting the duration of trusts; and
(b) the conferral on the courts of a wide discretion to vary trusts.

(a) A duration rule

5.50 A rule limiting the duration of trusts could have the advantage of being simpler to operate than the current rule against perpetuities, even with any of the statutory amendments suggested below.[78] The concept of limiting the duration of a trust is already part of our legal system, as a rule of this kind applies to certain non-charitable purpose trusts.

5.51 A rule of this nature has been adopted in other jurisdictions, including Jersey[79] and Guernsey.[80] Neither of these jurisdictions has ever had a rule limiting remoteness of vesting. Jersey law limits the maximum duration of a trust to a period of one hundred years from the date when the trust comes into existence. This is similar to the length of the perpetuity period under English law, but because a rule of duration concerns all interests arising under a trust, it could be argued that the period for it should be longer. We have not drawn any conclusion as to the optimum length for a duration period if one was to be recommended, although a period of a hundred years would have the advantage of uniformity with most of the other jurisdictions with a duration rule. We invite any consultees who favour replacing the rule against perpetuities with a duration rule to say how long they believe the period should be, and to indicate the reasons for their choice.

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[77] Paras. 5.35-5.44.

[78] Para. 5.56*ff*.

[79] Trusts (Jersey) Law 1984, Articles 11, 38 and 39.

[80] Trusts (Guernsey) Law 1989.

5.52 In formulating a rule limiting the duration of private trusts, it would be necessary to provide for the destination of property which remained unvested at the end of the trust period. Under the Trusts (Jersey) Law 1984,[81] where a trust terminates on its hundredth anniversary the property is held, subject to the terms of a trust and any court order, by the trustee on resulting trust absolutely for the settlor's personal representative. Whilst this provision apparently causes no difficulties in Jersey, its implementation in England would require changes to the present regime of taxation of trusts. Under present "benefit to settlor" rules, if there was, in relation to any new trust that failed to specify the destination of the property at the end of the trust period, a possibility that a resulting trust of the property might arise, then the settlor would be treated throughout the duration of the trust as retaining an interest in the trust property and would accordingly remain liable to income tax and capital gains tax.[82] Amendments to tax legislation could avoid this consequence. Alternative statutory provisions might conceivably be made concerning the distribution of unvested property, such as providing that it should automatically vest in any holders of contingent interests upon the termination of the trust, but these could be open to objection on the ground of unjustifiably violating the intentions of the disponor.

5.53 It has been argued that since Jersey law contains no rule against perpetuities there is nothing to prevent a settlor providing at the outset for the resettlement of any remote interest under a resulting trust which may come back to him at the end of the 100 year period.[83] If a duration rule did replace the rule against perpetuities in England then this point would have to be addressed. Resettlement of remote interests at the outset would, if permissible, be a straightforward means of circumventing the duration rule, yet any legislation to prevent it would, in effect, be a rule against remoteness of vesting. Thus the effective enforcement of a duration rule would require a form of rule against perpetuities, albeit perhaps simplified, to operate alongside it. For this reason we take the view that the attraction of a duration rule in terms of simplicity is more apparent than real.

5.54 We see a number of further arguments against the introduction of a duration rule. First, it is doubtful whether such a rule is necessary to curtail dead hand control or to ensure alienability of property. Secondly, the application of one maximum duration period to all types of trusts would run counter to the need for flexibility, which is desirable in light of the wide variety of modern trusts that are created, in the commercial sector as well as under wills and settlements. If a rule limiting duration was to be introduced there could be compelling arguments for exceptions to be created for specific types of trusts or interests thereunder, such as charitable trusts, pension trusts and employee benefit trusts, where considerable inconvenience could arise if they were to terminate by law at the end of a specified period. The need for a possibly wide range of exceptions to a rule limiting the duration of trusts would detract to a considerable extent from its simplicity. Furthermore, a rule of duration of trusts would not apply to contingent interests which are not created under trusts, such as

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[81] Article 38(1).

[82] Income and Corpooration Taxes Act 1988 ss.660-689 and Finance Act 1988 Sch. 10. "Benefit to settlor" rules are discussed in Chapters 12 and 13 of the Inland Revenue Consultative Document, "Trusts: The Income Tax and Capital Gains Tax Treatment of U.K. Resident Trusts".

[83] Matthews and Sowden, *The Jersey Law of Trusts* (2nd ed., 1990), paras. 7.89-7.92.

options, rights of pre-emption and future easements, and it would be necessary to decide whether to legislate for the termination of such interests at the end of a specified duration.

5.55 We therefore provisionally conclude that, in the absence of clear evidence that benefits would result from replacing the rule against perpetuities with a rule limiting the duration of trusts, the problems likely to arise render this an impractical option.

(b) Extended powers for the courts to vary trusts

5.56 We have observed that the court's powers to vary dispositions, under the Variation of Trusts Act 1958 and the Inheritance (Provision for Family and Dependants) Act 1975, function as a curb on dead hand control of property, but that the use of such powers is limited.[84] Other jurisdictions have canvassed granting courts extensive powers to vary trusts so that the law relating to variation of trusts can effectively perform the functions of the rule against perpetuities and supersede the rule entirely. For example, the Law Reform Commission of South Australia[85] included in their draft Bill a provision giving the court a form of cy-pres power to vary any trust where the interests under it could not or were not likely to vest within a period of years so that the interests vested forthwith or at a future date not longer than eighty years after the date of the disposition. The power is not restricted by the need to comply as nearly as possible with the intention of the settlor. The draft Bill also gives the court power to extinguish rights created in land which serve no useful purpose which have not been exercised for twenty years and whose continued existence affects the enjoyment of alienation of land[86]. We do not favour the introduction of such reforms here. Even the reform of the Variation of Trusts Act 1958 so that the court would be able to consent to any variation of the trust which was in the public interest would in our view be inadvisable. Reforms of this kind would confer extensive discretionary powers on the courts. There are a number of reasons why that might be considered undesirable. It could increase uncertainty among trustees and contingent beneficiaries, result in excessive interference with the intention of settlors and generate a large volume of litigation. Such consequences would be unjustifiable and accordingly we provisionally reject any proposals of this nature.

OPTION 4: REFORMING THE RULE AGAINST PERPETUITIES

Introduction

5.57 Commentators have made numerous suggestions for reforming the rule against perpetuities. In this section we discuss a range of options which might meet the criticisms of the rule discussed in Part IV above. The reforms we consider are:

(a) removing the need to apply the common law before wait and see;
(b) making a fixed period of years the only perpetuity period;

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[84] See paras. 5.42-5.43 and 5.27-5.30 above.

[85] 73rd Report (1984), pp.12-13).

[86] The Law Reform Commission of Saskatchewan rejected a proposal to extend variation of trusts legislation to include options:see the Report to the Minister of Justice by the Law Reform Commission of Saskatchewan (1987) p.27, para.4.

(c) introducing a "cy-près" power for the court to reform dispositions;
(d) making provision for advancements in reproductive technology; and
(e) introducing new exceptions to the rule.

(a) Removing the need under the 1964 Act to apply the common law before wait and see

5.58 One way to simplify the rule against perpetuities in relation to dispositions to which the 1964 Act applies would be to remove the need to apply the common law prior to invoking wait and see.[87] In assessing the validity of a contingent interest it would then cease to be necessary to determine at the outset whether it must vest, if at all, within the perpetuity period.

5.59 The advantage of this would be that one would no longer have to consider unlikely and far-fetched possibilities, but would simply have to determine whether there was a possibility that the contingent interest could vest within the perpetuity period.[88] If there was such a possibility, then the appropriate wait and see period would be applied and the interest treated as valid for the duration of that period, or until it subsequently became apparent that the interest could not vest within the period. Upon this becoming apparent the special rules in ss. 4 and 5 of the 1964 Act,[89] if applicable, would operate to save the interest, otherwise it would become invalid.

5.60 Abolition of the common law rule could be achieved by amending s.3 of the 1964 Act. In ss.3(1)-(3) the clause "Where apart from the provisions of this section and sections 4 and 5 of this Act, a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time" would be omitted. If the argument is accepted that the list of statutory lives in being in s.3(5) does not encompass all the persons who could be lives in being at common law,[90] then it would be desirable to amend s.3(5) to make sure that all gifts which were valid at common law would also be valid under the Act.

5.61 The benefit of simplifying the rule in this way must be balanced against any possible disadvantages. "Wait and see" was introduced as a necessary measure to validate reasonable dispositions which were void at common law, but not all commentators have regarded it as a perfect solution. It has been suggested that it creates uncertainty, causing administrative inconvenience and storing up problems to be resolved in the future.[91] On this view it

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87 See para. 2.3.

88 This would be necessary because if it is certain from the outset that a contingent interest cannot vest within the perpetuity period then wait and see is inapplicable and the interest is void from the outset.

89 Paras. 2.31-2.34 and 2.36-2.37 above.

90 See Maudsley, *The Modern Law of Perpetuities* (1979), pp 158-160 and "Measuring Lives Under a System of Wait and See"(1970) 86 L.Q.R. 357,372-5;Morris and Wade, "Perpetuities Reform at Last" (1964) 80 L.Q.R.486,505-6.

91 Such arguments are considered by Maudsley in "Perpetuities: Reforming the Common-Law Rule - How to Wait and See" (1975) 60 Cornell Law Review 355, and by I.M. Bloom, "Perpetuities Refinement: There is an Alternative", (1987) 62 Wash. L.R.23, 33 - 58.

would be regarded as a retrograde step to apply it to all dispositions rather than just those which are void at common law.

5.62 However, we do not support these criticisms of wait and see. It is wrong to place too much weight on the argument that abolishing the common law would create greater uncertainty, as the "uncertainty" arises from the very nature of contingent interests. It is necessarily the case, irrespective of the rule against perpetuities, that potential beneficiaries are always "uncertain" in the sense that they cannot be sure in advance whether their interest will ever vest. It is equally true of interests which are valid at common law, as it can never be certain in advance that a contingent interest will vest at all. A gift to the first child of A to attain 21, where A has a child of 16 at the date of the gift, is valid at common law, but it might never vest because A's child might die before the age of 21.[92] It is to be noted that Wait and see will only cause additional uncertainty in cases in which it is wholly unclear whether a contingent interest is likely to vest, if at all, within the perpetuity period. Such situations may easily be avoided by competent draftsmen. In the case of many contingent interests subjected to wait and see it will no doubt be clear whether or not they are likely to vest within the perpetuity period, albeit that some hypothetical doubt must exist.

5.63 As to other arguments against "wait and see", we see no reason why trustees should be inconvenienced since they have statutory powers to apply income and capital for the benefit of prospective beneficiaries, and where a contingent interest is later found to be void, s.3(1) of the 1964 Act protects the validity of such previous applications. And in the absence of evidence to support arguments that wait and see is storing up problems for the future, we place little weight on views that are purely speculative.

5.64 Taking these factors into account, we are drawn to doubt whether the 1964 Act was right to have retained the common law rule, and we have reached the provisional view that there is a strong case for its abolition. We ask consultees who favour abolition of the common law rule to consider whether this reform should have retrospective effect but not, of course, deprive persons of vested interests in property which they have acquired as a result of application of the common law rule or whether it should only apply to new dispositions. Unless the reform is retrospective, then for the reason explained in para. 5.6 above there would thenceforth be three separate perpetuities regimes in existence, and any improvement to the law in relation to new dispositions would have to be balanced against this increase in the complexity of perpetuities law as a whole.

(b) Make a fixed period of years the only perpetuity period

5.65 For simplicity, a single fixed period of years could be the perpetuity period for all dispositions to which the reform applied, unless the disponor specified a shorter period of years as the perpetuity period in the instrument. It would cease to be possible to specify a perpetuity period based on lives in being.[93]

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92 Maudsley, "Perpetuities: Reforming the Common-Law Rule - How to Wait and See", (1975) 60 Cornell Law Review 355 at 379.

93 This has been done in New South Wales and Australian Capital Territory. For example, the Perpetuities and Accumulations Ordinance (A.C.T.) 1985, s.8, provides that "For the purposes of the rule against perpetuities, the perpetuity period applicable to an interest created by a settlement shall,

5.66 The consequence of this measure would be to remove the concept of lives in being from the operation of the rule against perpetuities. This would remove all the problems associated with lives in being, such as the complications, uncertainties and administrative inconvenience of tracking lives.

5.67 Two issues need to be addressed in relation to this proposal: the length of the proposed fixed period and the extent of any exceptions. One option for the length of the period would be 80 years, which is the maximum period which at present may be specified in an instrument under s.1 of the 1964 Act. Some might argue that this period is not long enough, and that 90 or 100 years would allow settlors and testators more flexibility, and approximate more closely to the length of period obtainable at present by the use of royal lives clauses.[94] Responses to our enquiries of solicitors' firms indicated a preference for 100 years rather than 80 years for two reasons: first, that this would align the law with that of other jurisdictions such as the Cayman Islands and Bermuda which have a hundred year period, removing a possible inducement for trust funds to be removed to such other jurisdictions; and, secondly, that the eighty year period can be inconvenient since it restricts a settlor or testator who wishes to provide for more than one generation and thinks that a reasonably mature age, such as 30, should be reached before a beneficiary acquires a vested interest in the capital. It does not permit octogenarian beneficiaries with interests in possession to exercise special powers of appointment by will. The weight of these arguments is debatable: in most cases the length of the perpetuity period probably ranks well behind tax considerations as a factor in deciding whether to set up a trust offshore, and cases of octogenarians wanting to exercise a testamentary special power of appointment must be rare. However we have formed no provisional conclusion as to the most desirable length for a fixed perpetuity period, and invite opinions on this point.

5.68 A possible disadvantage of a fixed period of years is that it could encourage the creation of contingent interests that would not vest until near the end of the perpetuity period and therefore increase dead hand control.[95] But at present the majority of contingent interests vest before the end of the perpetuity period applicable to them, and there is no evidence that this would change significantly. It might, however, not necessarily be desirable to apply the same fixed perpetuity period to all types of contingent interests. For example, a shorter period might be considered necessary in the case of options to purchase land (other than leasehold options), for which the maximum perpetuity period is currently 21 years.[96]

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subject to this section, be 80 years from the date on which the settlement takes effect".

[94] U.S.R.A.P. removes the perpetuity period of lives in being for "wait and see" purposes and introduces a fixed period of ninety years. This period was considered, on the basis of technical calculations, to approximate to the average period of time that would traditionally be allowed by "wait and see": see L.W. Waggoner, "The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90 year waiting period", (1988) 73 Cornell Law Review 157, 162.

[95] This point is considered and dismissed by L.W. Waggoner, "Wait and See: The New American Uniform Act on Perpetuities" (1987) C.L.J. 234, at pp.238-239.

[96] Section 9(2) of the 1964 Act. Whether this restriction is justified is discussed in para. 5.84 below.

(c) Introduce a cy-près system

5.69 A number of other jurisdictions have implemented a cy-près system, by which the courts are given jurisdiction to reform contingent interests which would otherwise be void for perpetuity, so that they approximate as closely as possible to the intention of the disponor whilst complying with the rule against perpetuities.[97] For this power to be exercised the court must be able to determine the general intention of the testator, which must not have been deliberately to create a perpetuity. The introduction of a cy-près jurisdiction would redress the alleged harshness of the rule arising from the position that a breach of the rule renders a contingent interest wholly void.[98]

5.70 Several points of detail must be considered in relation to this proposal:

(i) whether cy-près would be applicable only after the wait and see period, or would be available as an alternative to waiting and seeing;

(ii) the means available to the court to determine the intention of the disponor;

(iii) who would have standing to make a cy-près application to the court;

(iv) whether the courts would have jurisdiction to "rewrite" a disposition or merely to strike out words causing it to be void for perpetuity.

(i) When should cy-près be available?

5.71 A cy-près jurisdiction could be available to reform a disposition either: (i) at any time after the instrument came into effect; or (ii) only after "wait and see" had applied and it had become apparent that the gift was void. The practical advantage of the first option would lie in the benefit to trustees of being able to avoid the uncertainty of "waiting and seeing", since the trustee would know as soon as a court order had been obtained how to administer the trust from then on. However, the U.S. Commissioners on Uniform State Laws considered the idea of permitting cy-près to be used prior to invoking "wait and see", and rejected it principally on the ground that such an approach would amount to an unjustifiable distortion of the donor's intention.[99] It was considered that it would fail "to grant every reasonable opportunity for the donor's disposition to work itself out without premature interference". It might also generate litigation, and be liable to impose an element of arbitrariness in the ultimate vesting of interests, since the cy-près solution might differ depending on the time at which the question was considered by the court.

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[97] S.3 of U.S.R.A.P. empowers the Court, upon the petition of an interested person, to reform dispositions in this manner. As well as the 16 states which so far have adopted U.S.R.A.P., six other states (Iowa, Kentucky, Ohio, Texas, Vermont and Washington) had already enacted similar provisions. Cy-près provisions have also been introduced in Alberta, British Columbia and New Zealand, and Tasmania.

[98] See para. 4.15 above.

[99] See Lawrence W. Waggoner, "The Uniform Statutory Rule against Perpetuities: The Rationale of the 90-year Waiting Period", (1988) 73 Cornell Law Review 157, n.4.

5.72 The second alternative has been adopted by U.S.R.A.P. for these reasons, the theory being "to defer the right to reformation until reformation becomes truly necessary". In the states in which it has been implemented it is rarely invoked, but is available as a residual method of validating dispositions in cases when, as a result of inept drafting, there is a failure to either vest or terminate within the perpetuity period. Whilst it does not have the advantage of increasing certainty from the outset, it does go some way to increasing the likelihood that the testator's intent will be fulfilled as nearly as possible. It appears to us that if cy-près is considered to be a viable option this would be the preferable method of implementing it.

(ii) Determining the intention of the disponor

5.73 It will frequently be difficult to determine the "general intention" of the disponor, who will rarely have fully addressed his mind to the matter. This would particularly be so if the question did not fall to be determined until the end of the "wait and see" period. There would undoubtedly be some cases in which no such intention could be discerned and so it would be impossible for the court to draw up a cy-près reformation of the disposition.

5.74 It might be desirable for a statute enacting cy-près to give guidance to the courts as to how to determine this question. Reformation provisions in some American statutes, including U.S.R.A.P., fail to include clear guidance, and are open to criticism for vagueness and uncertainty.[100] The main points to address would be whether ordinary rules of construction of documents should apply or whether they should be modified, and whether the courts should be able to consider extrinsic evidence to cast light on the disponor's intention. A possible precedent may be found in recent Tasmanian legislation providing for cy-près modification,[101] which incorporates specific provisions[102] that the court:

> "(a) may admit extrinsic evidence of the general intentions of the general intentions originally governing the disposition and must apply liberal rules of construction for the purpose of ascertaining them; and
>
> (b) must have no regard to the rights of any person other than-
> (i) a person born or en ventre sa mère when the disposition was made; and
> (ii) a person entitled on the death of any such person".

(iii) Standing to make an application

5.75 It would be necessary to decide which parties had standing to make a cy-près application to the court. The Tasmanian legislation[103] gives standing to the trustees of the

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[100] For example, the Vermont statute (Vt. Stat. Ann. tit.27, S.501) baldly states: "Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest."

[101] Perpetuities and Accumulations Act 1992, s.24. This section enacts recommendations contained in the Tasmanian Law Reform Commission's Report No.34, *Report and Recommendations upon Perpetuities and Accumulations* (1983), at pp.15*ff*.

[102] *Ibid.*, s.24(3).

[103] *Ibid.*, s.24(4).

property comprised in the disposition; the settlor or his personal representatives; and any person having an interest (whether vested or contingent) under the disposition or the personal representatives of any such person to whom the interest passes.

(iv) Extent of jurisdiction

5.76 The final question is whether the court should be given power fully to rewrite dispositions to the extent necessary, or only a more limited jurisdiction. The Law Reform Committee considered the alternative of a "blue pencil jurisdiction", under which the court would only have power to alter a contingent interest by striking out the words responsible for causing the interest to infringe the rule, but would not be able to modify or add to them.[104] We provisionally agree with the Law Reform Committee in rejecting this option as it seems clear that cases where it would save an interest from being void would be rare, and insufficient to outweigh the difficulties that it would create.

5.77 The Law Reform Committee also disliked the suggestion of a full power to reform dispositions. They considered that its effect would be difficult to foretell and that it would be difficult to exercise. They were "far from convinced that the complexities inherent in such a vague and uncertain jurisdiction would be outweighed by any practical advantage".[105] Nevertheless, their recommendations relating to for example, age-reduction and class gifts could be regarded as involving an element of cy-près which is strictly controlled, since the effect of these rules is, within the limitations of their scope, to reform dispositions to the minimum extent necessary to make them comply with the rule against perpetuities.[106]

5.78 We see merit in principle in the introduction of a general cy-près jurisdiction to apply after wait and see has been invoked. But the desirability of such a jurisdiction in practice would depend on whether it would be of sufficient benefit to outweigh the likely difficulties. We invite opinions on this question, and we invite consultees who favour the cy-près scheme to comment on the details of a scheme which they would favour.

(d) Make provision for advances in reproductive technology

5.79 We have discussed the perpetuities problems which may arise from advances in reproductive technology, and noted that many of these are dealt with by provisions of the Human Fertilisation and Embryology Act 1990. But these provisions do not cover all possible problems. In particular, they would not be determinative of the effect of an attempt by a testator to leave property to a cryopreserved embryo, which would depend on the status of the embryo rather than that of the parents. This is not addressed by the 1990 Act, and it appears to us that some provision about it would be desirable in any legislation reforming the rule against perpetuities. It might, for example, be enacted that no valid disposition of property may be made to an embryo which is not *in utero* at the date of the disposition, and that no such embryo may be a life in being for the purpose of the rule against perpetuities. We invite comments on this subject generally, and in particular in relation to the need for a

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[104] Fourth Report of the Law Reform Committee (1956), Cmnd.18, paras. 30-31.

[105] *Ibid.*

[106] See paras. 2.31-2.34 and 2.36-2.37 above.

statutory provision along the lines we suggest, and the identification of any other potential problems which may be relevant for consideration.

(e) Create new exceptions to the rule against perpetuities

5.80 Another option for reform is to reassess the exceptions to the rule against perpetuities in the light of the policy functions of the rule, and to extend the exceptions to further areas where the policies behind the rule do not appear to be applicable. We examine this possibility with respect to a number of types of disposition, and also consider the wider reaching suggestion that there should a general exclusion from the rule of all commercial dispositions.

(i) Exclusion of specific types of dispositions

(1) PENSION SCHEMES

5.81 It is difficult to identify policy reasons for applying the rule against perpetuities to pension schemes. Property is not rendered inalienable because it is subject to the trusts of a pension scheme, and the dead hand has extremely limited scope in this area since it is common for such trusts to stipulate expressly that the trust may be determined or the provisions of the trust altered within a predetermined framework if conditions make such action appropriate. In the case of occupational pension schemes, intended to provide for an ever changing body of employees of a particular business, to confine the vesting of interests either to a fixed period of years or to a period based on lives in being seems particularly inappropriate. The only period which has any relevance is the life of the business.

5.82 In the light of these considerations, a number of other jurisdictions have exempted pensions from the rule against perpetuities.[107] In England and Wales many pension schemes are exempted from the rule by the Social Security Act 1973, s.69 (as amended).[108] The existence of this statutory dispensation is an indication that the rule against perpetuities imposes an unsatisfactory restriction in relation to pension schemes. However, the section's conditions for the exemption of schemes, such as having Inland Revenue approval or, in the case of occupational pension schemes, being contracted out of the State Earnings-Related Pension Scheme, bear no obvious relationship to the policy functions of the rule against perpetuities. A number of the solicitors' firms whom we informally consulted represented to us that they are unduly complex. We provisionally take the view that all pension schemes should be exempted from the rule.

(2) FUTURE EASEMENTS

5.83 Future easements could be removed from the scope of the rules.[109] Although the

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[107] E.g. New South Wales and Australian Capital Territory. U.S.R.A.P., s.4(6), provides more generally that nonvested property interests forming part of employee benefit schemes are exempted from the rule.

[108] See paras. 2.67-2.69 and 4.8 above.

[109] The Law Reform Commission of Ireland has recommended that easements and profits à prendre be removed from the effect of the rule: see *Report on Land Law and Conveyancing Law: (1) General*

potential problems arising from *Dunn* v. *Blackdown Properties Ltd.*[110] are in practice usually met by the stipulation of a 80 year perpetuity period under s.1 of the 1964 Act, it appears doubtful whether there is any policy need to limit the period during which a future easement must take effect.

(3) OPTIONS AND CONTRACTS

5.84 Options for renewal contained in a lease are exempt from the rule against perpetuities at common law. Options contained in a lease to purchase the freehold reversion are also exempt by virtue of the 1964 Act, provided that they fall within certain conditions in s.9(1) of the Act. All other options to purchase land (collectively termed by the Law Reform Committee as "options in gross") are, under s.9(2) of the 1964 Act, subject to a perpetuity period of 21 years. The reason given by the Law Reform Committee[111] for recommending that the perpetuity period for options in gross be so restricted was that they "tend to discourage rather than foster the maintenance of the land in question", since the only person who can develop the land is the person in possession, and he will be discouraged from doing so if the fruits of his labours and investment are liable to be taken from him when someone else exercises an option to purchase the land. This argument carries some weight in relation to options to purchase land at a fixed price, but appears inapplicable where an option is granted to purchase at the market price prevailing at the time that the option is exercised, since in that case the cost of maintenance or investment in the land will be reflected in the price payable upon the subsequent exercise of the option. There thus appears to be a strong case for at least confining the operation of s.9(2) to options to purchase land at a fixed price. Indeed, it is arguable that the length of time for which options in gross may subsist is a matter which should properly be left to commercial negotiations, and that the application of the rule against perpetuities to such interests in any circumstances constitutes an unwarrantable interference with principles of freedom of contract.[112]

5.85 The rule against perpetuities also applies to options to purchase personal property, such as share options, and to interests other than options which are conferred under contracts,[113] to the extent, if any, that such options or other interests are proprietary rather than merely personal. Whether such interests are proprietary depends on whether the contract is specifically enforceable, which may not always be readily apparent.[114] Thus it may

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Proposals (L.R.C. 30-1989), para.20.

110 [1961] Ch. 433. See para. 2.58 above.

111 Fourth Report (1956), Cmnd. 18, paras. 35-38.

112 The Law Reform Commission of Ireland. op. cit., n.109, has recommended that all land options be excluded from the rule.

113 These could include interests conferred under conditional contracts, or interests conferred under contracts stipulated to take effect at a specified future date.

114 Specific performance is a discretionary remedy, but the most important requisite for it to be granted is that damages should not be an adequate remedy. For example, specific performance of an option to purchase shares will only be granted in exceptional circumstances where the shares are in a publicly quoted company and equivalent shares are readily available on the free market (*Chinn* v. *Hochstrasser*

sometimes be unclear whether, for example, share options are subject to the rule against perpetuities. Difficulties are rarely likely to arise in practice as the parties to a share option agreement will usually specify a precise period, generally much shorter than the perpetuity period, during which the option may be exercised. But it nevertheless seems difficult to justify the uncertainty which could, in certain cases, arise as a result of the rule being applicable to such interests. Again, such interests are commonly negotiated at arms length in a commercial setting, and there is a case for their exemption from the rule.

(4) RIGHTS OF PRE-EMPTION

5.86 In the light of the Court of Appeal's discussion of the nature of rights of pre-emption in *Pritchard* v. *Briggs*,[115] it appears that they are outside the scope of the rule against perpetuities for the reason that they do not create proprietary interests. However, responses to our questionnaire[116] suggest that some practitioners still regard the point as open to question, principally because the proviso to s.9(2) of the 1964 Act appears to take for granted that rights of pre-emption are indistinct from options for the purposes of the rule.[117] Accordingly we consider that it would be desirable to enact, for the avoidance of doubt, that rights of pre-emption are exempt from the rule. The proviso to s.9(2) should be repealed as *Pritchard* v. *Briggs* has rendered it obsolete.

(5) CONTINGENT DISPOSITIONS TO CHARITY

5.87 Finally there might be a case for making gifts to charity totally exempt from the rule. It may be that the rule is rarely in practice a problem as a result of the law concerning gifts over from one charity to another and the cy-près doctrine.[118] However, if an existing charity is to receive a benefit only on the happening of some remote contingent event, there appears to be no good reason why the court should not be left to apply the cy-près doctrine if the designated charity is no longer in existence when the contingency occurs, yet the rule against perpetuities prevents application of the cy-près doctrine in that manner.[119]

(ii) Exclusion of all commercial dispositions

5.88 Rather than merely add to the specific types of dispositions which are excluded from the rule against perpetuities, the rule could be stated to be inapplicable to any contingent

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[1979] Ch. 447), but may be more likely to be available where the shares are in a private company and equivalent shares are not obtainable. With regard to a contract relating to the sale of a chattel, the Sale of Goods Act 1979, s.52, gives the court discretion to grant specifically performance where the chattel is "specific or ascertained", such as a painting or antique, but the court is unlikely to grant the remedy where the chattel is simply "an ordinary article of commerce": *Whiteley Ltd.* v. *Hilt* [1918] 2 K.B. 808, 819, per Swinfen Eady M.R.

[115] [1980] Ch. 338.

[116] See para. 1.16.

[117] See para. 2.60 above.

[118] See generally Hanbury & Martin: *Modern Equity* (14th ed., 1993), pp.439-454.

[119] This point is made by the Law Reform Committee of Saskatchewan, op. cit, n.61, at p.19.

interests in property created in a commercial context. This would give due recognition to the importance of freedom of contract in commercial transactions, where the policy of restricting dead hand control appears to be of little relevance.

5.89 The main difficulty with this proposal lies in defining commercial interests for the purpose of the exclusion. It might be difficult to determine whether, for example, the pension scheme of a family company ought to fall within the exemption where the employees were all from the same family. It could prove necessary to introduce provisions to thwart avoidance measures, similar to existing anti-avoidance tax legislation, which would add considerable complexity to the law relating to perpetuities.

5.90 A comparison may be made with s.4(1) of U.S.R.A.P., which exempts from the rule against perpetuities all non-donative (or commercial) transfers of property apart from certain arrangements between spouses and contracts to make or not to revoke a will or trust, or to exercise or forgo exercising a power of appointment. The "non-donative" exemption is likely to cover interests such as options, future easements and rights of pre-emption where the consideration for the grant of the right was its market value and the parties were at arms length.

Provisional conclusion

5.91 Following examination of the various options for reform, our provisional view is that the choice is between recommending that the rule against perpetuities be abolished without a replacement or that it be retained and reformed. We have not reached any conclusion as to which option would be preferable. In the interests of simplicity, we provisionally favour that the legislation should be retrospective, subject to the restriction that it should not cause any person to be deprived of an interest which has already vested. At this stage the option of taking no action does not appear to us to be realistic given the strength of the criticisms of the rule which we have identified. Replacing the rule against perpetuities with a new rule appears to us to run the risk of creating more practical difficulties and objections than it would solve. As we have seen a rule relating to duration of trusts would bring the problem concerning the destination of trust property at the end of the period and taxation problems. Extending the powers of the court would lead to uncertainty, excessive interference with the intention of settlors and generate a large volume of litigation.

PART VI

OPTIONS FOR REFORMING THE RULE AGAINST EXCESSIVE ACCUMULATIONS

Introduction

6.1 As with the previous section dealing with the rule against perpetuities, we shall consider each of the possible courses of action which it is open to the Commission to recommend:

(1) to do nothing
(2) abolition of the rule
(3) reform of the rule.

Should abolition or reform be retrospective?

6.2 The impact of retrospective abolition or reform of the rule against excessive accumulations on persons with a future interest in the trust property would differ slightly from retrospective reform of the rule against perpetuities, as a consequence of accumulations being valid until the end of the permitted accumulation period. But, generally, similar considerations apply as are discussed in relation to the rule against perpetuities. We invite comments as to whether abolition or reform of the rule against excessive accumulations should be retrospective.

OPTION 1: TO DO NOTHING

6.3 It is not obvious that the rule against excessive accumulations has had a major impact on the way in which people dispose of their property, but that may simply be because it lays down requirements with which property owners can always comply. However, the lack of disputes makes it difficult to demonstrate the positive good which it achieves. The case in favour of its retention without amendment must rest mainly on taking the view that its original functions should still be performed, and that the rule performs that job. Further, it is hard to point to definite harm which has been done by the rule in its present form.

OPTION 2: ABOLITION OF THE RULE

6.4 We set out below the arguments for and against the abolition of the rule against excessive accumulations.

(a) The case for abolition

(i) No need to restrict accumulations

6.5 The principal argument for the abolition of the rule is that it constitutes a restriction on a person's power to deal with his property as he thinks fit, for which there is not, or is no longer, any justification. Those who take the view that freedom within the law requires that no unnecessary curb should be placed on a property owner's freedom of disposition may

say that no case for a restriction had been made out. An absolute owner's right to reinvest his income, rather than spending it, is unfettered. Why, the argument runs, should he not impose conditions to continue that practice when he gives the property away?

6.6 Furthermore, abolition might not make any significant difference, bearing in mind that, for example, companies, unit trust schemes and pension schemes are already permitted to accumulate without being bound by the rule, and that in certain circumstances accumulations directed by individuals can already last for fifty years or longer.[1] Indeed, the rule's inapplicability to such important types of trusts in itself makes it questionable whether the rule deserves any place in a modern law of trusts.

(ii) Other rules of law operating to restrict accumulations

(1) THE RULE AGAINST PERPETUITIES

6.7 If the rule against excessive accumulations was abolished, directions to accumulate income which were in breach of the rule against perpetuities would still, at common law, be void. Thus the rule against perpetuities to some extent operates to curtail the mischief of dead hand control over income, as well as capital. It must be remembered that the rule against perpetuities, being a rule against remoteness of vesting, only applies in cases where the right of the beneficiary to enjoy the income is contingent on the accumulation having taken place. It is possible, as a matter of construction of a settlement or devise, that a person to whom income is directed to be paid after accumulation, might have from the outset a vested right to the capital or income. In such cases, the rule against perpetuities has no application and cannot prevent accumulation from continuing indefinitely. However, provided that no other party has any interest in the accumulation, the beneficiary is entitled to stop it and claim possession of the income as soon as he attains his majority.[2] Thus there is no "dead hand control".

6.8 Many Commonwealth jurisdictions[3] have taken the view that the rule against perpetuities performs the function of restricting dead hand control over income sufficiently to make it unnecessary to have a separate statutory accumulation period.[4] Simes argues:

> "We are considering the question: Shall the dead hand or the present generation determine how much income is to be put back into capital? Stated thus, the problem becomes essentially the same as that which led us to conclude that there should be a Rule against Perpetuities. The earth belongs to the living. We should strike a balance between the desire to provide accumulations for future generations and the desire of future generations to dispose of the world's wealth."[5]

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1 See para. 3.31 above.

2 *Saunders* v. *Vautier* (1841) Cr & Ph 240. See paras 3.26-3.27 above.

3 See para. 6.16 below.

4 See, for example, Allan, "The Rule Against Perpetuities Restated", (1962-64) 6 W. A. L. Rev. 27, 72, written by the draftsman of the Western Australian Act which abolished the rule.

5 Public Policy and the Dead Hand (1955), p.99.

6.9 This argument is obviously inconsistent with simultaneous abolition of the rule against perpetuities. We therefore invite consultees who favour abolition of the rule against excessive accumulations to indicate whether their support for this option depends on the retention of the rule against perpetuities, or whether they would favour the abolition of both rules.[6]

(2) TAX LEGISLATION

6.10 To the extent that accumulation of income may still be regarded as undesirable, taxation of accumulation trusts may be used as an effective, and discriminating, means of discouraging it. In general terms, accumulation trusts are subject to both income tax and inheritance tax. At present trustees are liable to pay basic rate income tax (currently 25%) plus additional rate tax (currently 10%) on trust income which is to be accumulated. This means that an income tax saving will be achieved by accumulating income if a beneficiary is paying tax at 40%.[7] However, inheritance tax must also be taken into account.[8] A charge to inheritance tax is incurred upon the initial transfer by the settlor to the trust,[9] and in the case of trusts without an interest in possession a further periodic charge is levied every ten years after the date on which the settlement is created, with a proportionate periodic charge whenever property leaves the trust or an interest in possession is created between 10 year anniversaries.

6.11 It seems likely that if longer accumulations of income were made possible, the combined effect of these taxes would be to act as a powerful deterrent against their creation (other than within the accumulation and maintenance trust regime).

(3) FAMILY PROVISION LEGISLATION

6.12 The Inheritance (Provision for Family and Dependants) Act 1975 gives the family and dependants of a testator power to apply to the court for an order that "reasonable financial provision" for the applicant should be made out of the testator's estate. This serves one of

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6 The Law Reform Commissions of Manitoba and Saskatchewan both argued for abolition of the rule against excessive accumulations coupled with abolition of the rule against perpetuities: see *the Manitoba Law Reform Commission's Report on the Rules against Perpetuities and Accumulations*: No. 49 (1982) and *the Saskatchewan Law Reform Commission's Proposals Relating to the Rules Against Perpetuities and Accumulations* (1987).

7 The Inland Revenue's Consultative Document on the Taxation of Trusts, Chapter 5, proposes reforms to the taxation of discretionary and accumulation trust income which would change this. Trusts currently subject to additional rate tax would be taxed at the basic rate on all income, and at the higher rate (i.e. 40%) on accumulated income in excess of an annual limit. The proposals are summarised at para. 5.43, *ibid.*

8 See *Foster's Inheritance Tax* , (1991) Vol. 1, Division E.

9 A chargeable transfer to a trust without an interest in possession made inter vivos is charged at half the full rates. If made on death or within seven years of death it will be chargeable at full rates, subject to tapering relief in the case of an inter vivos transfer made more than three years before death. If the trust is one with an interest in possession, then an inter vivos transfer by the settlor will be a potentially exempt transfer, although again chargeable at full rates, subject to tapering relief, if the settlor dies within seven years.

the functions of the rule against excessive accumulations by preventing testators from starving their immediate dependants in order to benefit more remote generations.

(4) THE VARIATION OF TRUSTS ACT 1958

6.13 The court has a wide power, on behalf of the classes of persons set out in the Variation of Trusts Act 1958, to vary or terminate accumulations, where to do so would benefit the beneficiaries on whose behalf approval is given. An example of the court using the Act's powers to terminate an accumulation is provided by *Re Tinker's Settlement*.[10]

(iii) Avoidance measures

6.14 Other rules of law may be used in some circumstances to enable income to be accumulated for longer than the periods laid down in Law of Property Act 1925 s.164 (as amended). These may, in a sense, be regarded as avoidance measures. First, it is possible for trustees to apply for a court order under the Variation of Trusts Act 1958 to obtain an extension of the accumulation period once all other available periods have been used up.[11] Secondly, accumulations may be achieved for longer than 21 years by making a series of revocable but contingent appointments in favour of minors who are never intended to benefit so that Law of Property Act s.165 operates and the powers of accumulation under Trustee Act 1925 s.31 can be used.[12]

6.15 Some solicitors' firms whom we consulted indicated that settlors sometimes seek to avoid the effect of the rule in other ways. First, the ability to accumulate income for much longer periods in other jurisdictions undoubtedly leads some settlors and testators to establish accumulation trusts that are governed by foreign law. Secondly, the exclusion of corporate settlors from the rule against excessive accumulations provides scope for avoidance of the rule by creating a company and using this as a vehicle for settling property. Finally, as a last resort trustees sometimes continue to accumulate income beyond the accumulation period, by (perhaps tacit) agreement with the beneficiaries. The trustees may favour such arrangements where, for example, income needs to be accumulated to preserve the value of the trust property. We would welcome more information on how widespread these practices are, and to what extent they are effective.

(iv) The position in other jurisdictions

6.16 Many other jurisdictions with a law of trusts do not have a separate rule against excessive accumulations. These include Northern Ireland and the Irish Republic. Jersey and Guernsey restrict the duration of trusts to 100 years, but have no shorter accumulation period. Several jurisdictions in which the Accumulations Act 1800 was formerly in force have

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[10] [1960] 1 W.L.R. 1011. The benefit to the beneficiaries consisted of the avoidance of estate duty that would have been incurred if the accumulation had not been stopped. It might be more difficult to show a benefit to all the beneficiaries on whose behalf the Court has to approve a variation unless there is some similar benefit of a fiscal nature.

[11] See *Re Holt's Settlement* [1969] Ch. 100, 118-119.

[12] See para 3.31 above.

repealed it in recent years. These include Western Australia,[13] New Zealand,[14] Victoria,[15] Alberta[16] and British Columbia.[17] All these jurisdictions have retained a rule against perpetuities, and have argued in support of abolition of a separate maximum accumulations period that the perpetuity period acts as a bar against indefinite or very long accumulations. More recently Manitoba abolished both rules simultaneously.[18] The Law Reform Commission of Saskatchewan[19] has made a similar proposal which has not yet been implemented.

(b) The case against abolition

(i) Continuing relevance of the rule's functions

6.17 It is clear that the historical functions of the rule have similarities to those of the rule against perpetuities. The reasons for the creation of the rule seem to have been largely economic. The Accumulations Act 1800 was passed by Parliament as a direct response to the decision of the Court of Chancery (later upheld by the House of Lords) to uphold the will of Peter Thellusson in *Thellusson* v. *Woodford*.[20] That case showed that it was possible to set aside a fund to accumulate the income for the full perpetuity period of lives in being plus 21 years (which could potentially be 100 years or more), preventing the living from enjoying the capital or income in the meantime, in order that at the end of the period a fortune would have amassed which would pass to a fortunate beneficiary who might well be unborn at the date of the settlement. The Accumulations Act was passed to prevent this from happening, as two evils were seen as arising from the ability to accumulate income for up to the full length of the perpetuity period which made this contrary to public policy; first, harm to the economy by tying up property and withdrawing the income from the beneficiary's use during the period of accumulation; and, secondly, the danger that sufficient fortunes could be amassed for a few families to corner a large proportion of the nation's wealth (and particularly its land), and in consequence to achieve enormous power.[21]

6.18 It seems simplistic to suggest that accumulating income necessarily results in harm to the economy. The direction to accumulate presupposes that both capital and income will be invested, so the money is likely to be used to buy Government stock - i.e. to fund

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[13] Law Reform (Property, Perpetuities and Succession) Act (W.A.) 1962, s.17.

[14] Perpetuities Act (N.Z.) 1964, s.21.

[15] Perpetuities and Accumulations Act (V.) 1968, s.19.

[16] Perpetuities Act, S.A. 1972, c.121, s.24 (see now R.S.A. 1980, c.P-4, s.24).

[17] Perpetuities Act, S.B.C. 1975, c.53, s.24(1) (see now Perpetuity Act, R.S.B.C. 1979, c.321, s.24(1)).

[18] The Perpetuities and Accumulations Act, S.M. 1982-83, c.43.

[19] "Proposals Relating to the Rules Against Perpetuities and Accumulations" (1987).

[20] (1799) 4 Ves. Jun 227; (1805) 11 Ves. Jun 112. See n.8 to para. 1.7 above.

[21] It seems unlikely that it would now be possible to accumulate sums which would rival the wealth of today's major corporations.

Government expenditure - or to provide capital for some enterprise. The wealth is not withdrawn from the economy, but supports it just as much if the income is accumulated as if it is distributed. The difference - and this may be the distinction which constitutes the issue to be decided - is in who has control of the funds.[22]

6.19 In determining whether this distinction matters in modern conditions , we have to consider what would occur if there was no rule against excessive accumulations. Our enquiries so far have indicated that if the rule was abolished then significant numbers of disponors would be likely to take advantage of this to direct that income be accumulated for longer than the present permitted periods,[23] probably to a greater extent than that to which remotely vesting interests would be directed if the rule against perpetuities were to be abolished. The main constraint would be tax consequences, which would cause advisors to advise settlors against directing very long accumulations, but some solicitors have suggested to us that a small number of mainly elderly settlors would wish, in spite of the tax consequences, to direct very long accumulations if they were able to do so. We invite consultees to comment on the extent to which, in their experience, lengthy accumulations would be directed, if they were permitted, and whether any significant harmful effects would arise.

6.20 The other main function of the rule is to curtail "dead hand control" over income. This is primarily a question of principle. Is it right that persons should have control over the income from their dispositions after their deaths, or after they have made an irrevocable settlement? The reasons why dead hand control over capital may be thought undesirable have already been discussed in the context of the rule against perpetuities,[24] and are equally applicable here. It may indeed be argued that if one believes that dead hand control is wrong in principle, then it is difficult to justify accumulations at all, unless they serve some particular beneficial purpose. The Law Reform Committee's report[25] tended towards this point of view, considering a suggestion that any period of 21 years should be reduced to seven years, but deciding to recommend retaining the existing periods, saying that they "serve a useful purpose in enabling a fund to be built up to start children in life."

(ii) Need for the rule against excessive accumulations to ensure that the functions are performed

6.21 Many of the considerations which led us to conclude that the rule against perpetuities only performs its policy functions to a limited extent, are equally applicable to the rule against excessive accumulations. As has been seen, the functions are performed by other rules of law to a considerable extent, whilst at the same time it is possible for the rule to be avoided or its strictness mitigated in many cases. The other rules of law which we have

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22 Maudsley, *The Modern Law of Perpetuities* (1979) argues at p.201: "The accumulated income is required to be reinvested, and thus is in a constant source of circulation. Economically, the position is the same as if the income were paid to a beneficiary, and he saved and invested it.... Saving is...thought by many ... to be a virtue, and it plays a part in the development of the economy".

23 See paras. 4.31-4.33 above.

24 See paras. 5.13 - 5.14 and 5.35 - 5.36 above.

25 Fourth Report (1956), Cmnd. 18, paras. 55 and 56.

identified as performing the functions of the rule against excessive accumulations are: (1) the rule against perpetuities; (2) tax legislation; (3) family provision legislation; and (4) the Variation of Trusts Act 1958.[26] However, it is important to identify the limits to which these provisions could be effective to prevent excessive accumulations. Firstly, accumulations could last for up to 80 years, or longer by the use of lives in being, before they would be void for perpetuity, and one may take the view that this would be too long a period. Secondly, as noted in Part V,[27] tax provisions are always liable to change and so it might be wrong to rely too heavily on them to deter disponors from directing lengthy accumulations of income. Thirdly, the Inheritance (Provision for Family and Dependants) Act 1975 performs a specific and limited purpose: a wealthy testator could make reasonable provision for his immediate dependants so that the Act cannot be invoked, yet nevertheless direct a long period of accumulation of the income from the remainder of his assets. Fourthly, there have been few reported cases in the last twenty years on the Variation of Trusts Act 1958 and we are not aware of the power to vary trusts being widely used at present for the purpose of terminating or varying accumulations.

OPTION 3: REFORM OF THE RULE

6.22 If the rule against excessive accumulations is to be retained, there are a number of options for reforming it. These will be considered below.

(a) Change the accumulation periods

6.23 One option would be to replace the existing accumulation periods with a single maximum period. The choice of length of this period is bound to be arbitrary, but a period of eighty years from the date of the disposition would have some merit as being the period now most commonly chosen as the perpetuity period. This would make the accumulation period the same as the perpetuity period for a large number of accumulation trusts, which would have the merit of simplifying the law and resolving many of the criticisms of the present law which have been discussed above. The chief objection to this proposal would again be the "dead hand" argument: the view that eighty years is too long a period for a settlor or testator to be entitled to prevent the distribution of income.

6.24 This proposal was canvassed by Professor Hayton in his Inaugural Lecture.[28] He favoured lengthening the accumulation period for two reasons; first, because it would encourage the creation of percentage trusts,[29] and, secondly, to "make it possible to have a more flexible traditional trust where income is to be distributed but the trustees are given

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[26] Paras. 6.7-6.13 above.

[27] Para. 5.41.

[28] "Developing the Law of Trusts for the Twenty-First Century" (1990) 106 L.Q.R. 87, at pp.94-95.

[29] These are trusts in which the trustees make an annual payment to beneficiaries of a fixed percentage of the value of the trust's assets, instead of simply distributing all the income. Capital is used to supplement the income in years where it is insufficient to cover the percentage payment, and in years where there is surplus income after the payment has been made, the excess is accumulated and added to capital.

power to add to capital each year so much of the income as they consider necessary to keep up the objective or real value of the capital".

6.25 A less radical proposal, and one which is favoured by a number of the solicitors' firms whom we consulted, is to retain the present format of six alternative accumulation periods, but to amend all the alternatives which measure accumulation by reference to the duration of minorities, so that it would always be possible to accumulate income until beneficiaries attain the age of 25. This would require amendment to the Law of Property Act 1925 s.164(1)(c) and (d), and Perpetuities and Accumulations Act 1964 s.13(1)(b). It would be sensible to couple this with amendments to the Law of Property Act 1925 s.164(1)(b) and Perpetuities and Accumulations Act 1964 s.13(1)(a), changing the references to terms of twenty-one years to terms of twenty-five years. This would make the alternative periods more coherent, and allow the majority of settlors' and testators' wishes to be met without excessively lengthening the permitted accumulation periods. It would satisfy settlors and testators who believe that only at 25 could beneficiaries be trusted to use their property responsibly. It would also make the rule against excessive accumulations more consistent with the statutory tax concessions for accumulation and maintenance trusts.[30] On the other hand, this proposal would not of itself help to reduce the complexities and uncertainties contained in the rule.

6.26 A further alternative is to reduce any period of 21 years to 18 years. The merit of this would be to make the scheme of the rule fit better with the periods measured by minorities, now that the age of majority has been reduced to 18.[31] However, it would be going against the tenor of most of the criticisms we have discussed, that the accumulation periods are currently too short.

(b) Codify all the relevant law in one statute

6.27 If the statutory provisions relating to accumulations are to be retained, it might be beneficial to re-enact them in a single statute. This would make it simpler for practitioners to ensure that the rule is complied with, and in particular ought to ensure that the provisions of the Trustee Act 1925 s.31 are not overlooked in drawing up dispositions, something which we understand occasionally now happens, giving rise to problems at a later stage. We believe it would also be worthwhile enacting, for the avoidance of doubt, all the exceptions to the rule (incorporating any reforms that might be considered necessary). We have noted that there is possible room for doubt at present in that there is no definite authority that pension schemes are excluded from the rule.[32]

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30 See para. 4.37 above.

31 See para. 4.36 above.

32 See para. 4.28 above.

(c) Reform the exceptions to the rule

6.28 We would welcome views on possible changes to the exceptions to the rule against excessive accumulations. For example, should there be a general provision that all commercial transactions should be outside the scope of the rule? Should there be any additional exceptions, for instance for accumulations by charitable trusts,[33] or powers to accumulate?[34]

6.29 It is also necessary to consider whether the statutory exceptions to the rule, contained in Law of Property Act s.164(2), are satisfactory. These provisions have generated very little litigation in modern times, although there is a considerable body of mostly nineteenth-century case law construing the provisions for debts and portions. The exclusion from the rule of provisions for paying debts is relatively straightforward and seems unobjectionable. That for timber and wood is also straightforward, if archaic. Hargrave suggested that it was introduced in order to encourage the planting of timber at a time when native forests had been largely exhausted by naval demands during the American and Continental wars.[35] It may be that its abolition would have no adverse consequences, but on the other hand little would be gained.

6.30 The main candidate for reform is the exception for portions. This has caused considerable difficulty in interpretation. The courts have never clearly defined the meaning of portions, so that the scope of the exception can only be approximately determined by using the facts and outcomes of previous cases (mostly of considerable vintage) as a guide. Morris and Leach comment that the tendency has been towards a strict interpretation of the provision, and there have been few cases in which it has been held that an accumulation fell within its scope.[36] To abolish the exception might not have any detrimental effect in frustrating settlors' wishes, since it seems unlikely that settlors and testators will seek to take advantage of it when the courts are unlikely to hold that a direction to accumulate comes within its scope. We would like to know if any consultees are aware of any modern attempts to make use of the provision.

(d) Extend the "wait and see" provisions of the 1964 Act

6.31 There is some doubt as to whether "wait and see" applies to directions to accumulate for a period which might exceed the perpetuity period. Section 3 of the 1964 Act makes no

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[33] See the comments in para. 4.35.

[34] The suggestion has been put to us that it might be advantageous for the law to draw a distinction between powers and duties to accumulate income. It might be thought, for instance, that a duty to accumulate income for a long or indefinite period would be contrary to public policy, but a power to accumulate would not as the trustees would normally be under a continuing obligation to consider the needs and interests of beneficiaries before accumulating. We do not provisionally favour this suggestion because of the complexity it would add to the rule.

[35] "*Thellusson Act*" (1842), p.207, cited in Morris and Leach, *The Rule Against Perpetuities* (2nd ed., 1962) at p.289.

[36] Op. cit., pp.282-8. They cite *Beech* v. *Lord St. Vincent* (1850) 3 De G. & Sm. 678, *Barrington* v. *Liddell* (1852) 2 De G.M. & G. 480, and *Re Stephens* [1904] 1 Ch. 322.

express provision. Megarry and Wade suggest that it is possible that the "wait and see" provisions governing "any power, option or other right" might extend to accumulations, on the reasoning that duties are subject to the same rules as apply to powers, but the general opinion of commentators is that "wait and see" does not apply. On that view, directions to accumulate for a period which might exceed the perpetuity period are void from the outset. This has been widely criticised as being inconsistent with the 1964 Act's general policy of introducing the benefits of "wait and see".[37] It would be simple to enact that "wait and see" was to apply to such directions, so that every accumulation would be treated as valid for the "wait and see" period, subject of course to its being limited by the requirement of restriction to one of the permitted periods.[38]

(e) Other matters

6.32 We have noted that the Law Reform Committee considered the rule in the Law of Property Act 1925 s.165 and did not recommend any change to it. But we should welcome views. If the permitted accumulation periods were to be lengthened substantially there may be less justification for allowing accumulations to continue after the expiry of the directed accumulation period when the beneficiary is a minor at that time. If s.165 was repealed it would still be possible, in the situations which it covers at present, for the court to direct under the Variation of Trusts Act that an accumulation should continue beyond the accumulation period for the duration of the beneficiary's minority or for any other period.

6.33 We also refer for completeness to the rules governing the destination of released income when an excessive accumulation has been directed. The body of law generated by cases interpreting the provision for this in the Law of Property Act s.164 is quite complicated, but our impression is that it is well documented and generally understood, and does not require reforming.

Provisional conclusion

6.34 As with the rule against perpetuities our view is that the choice is between recommending that the rule against excessive accumulations be abolished or that it be retained and reformed. Providing any legislation did not deprive any person of a vested interest in property, we are in favour of the legislation introducing the reforms having retrospective effect. We provisionally consider that the criticisms of the rule against excessive accumulations indicate a need for action to be taken, and so we reject the option of doing nothing.

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[37] See, for example, R.H. Maudsley, *The Modern Law of Perpetuities* (1979), pp.207-8.

[38] Some of the other jurisdictions which have introduced "wait and see" have expressly enacted that it should extend to directions to accumulate income. Maudsley cites the Victoria Perpetuities and Accumulations Act 1968 as an example. Section 19(1) provides: "Where property is settled or disposed of in such a manner that the income thereof may be or is directed to be accumulated wholly or in part the power or direction to accumulate that income shall be valid if the disposition of the accumulated income is or may be valid but not otherwise."

PART VII

SUMMARY OF ISSUES

7.1 We end with a summary of the main issues and questions raised in this Consultation Paper on which we would welcome comments, and we should be particularly grateful if commentators would mention any factors or arguments which we may have overlooked.

A. THE RULE AGAINST PERPETUITIES

7.2 Having set out the present law relating to the rule against perpetuities in Part II, in Part IV we discuss a number of criticisms which might be made of the rule. These are on the following grounds:

(a) complexity; [paras. 4.3-4.8]
(b) uncertainty; [paras. 4.9-4.10]
(c) inconsistency; [paras. 4.11-4.12]
(d) interference with commercial contracts; [paras. 4.13-4.14]
(e) harshness; [para. 4.15]
(f) lack of adaptability; [paras. 4.16-4.17]
(g) expense. [paras. 4.18-4.19]

7.3 In Part V we consider four options:

Option 1: to do nothing; [paras. 5.8-5.10]

Option 2: to abolish the rule without replacement; [paras. 5.11-5.48]

Option 3: to abolish the rule and replace it with a new rule; [paras. 5.49-5.56]

Option 4: to reform the rule with a view to addressing criticisms of it. [paras. 5.57-5.90]

7.4 We note that the rule against perpetuities has endured in its modern form for over three centuries, and that it has been carefully considered by the Law Reform Committee relatively recently, resulting in substantial reforms being enacted by the 1964 Act. We consider, bearing this in mind, that a strong case must be made out for us to be able to recommend abolition or major reform of the rule. Nevertheless, in view of the extensive criticisms of the rule which we have identified in Part IV, we provisionally conclude that some action is necessary, and therefore reject Option 1 [para. 5.91].

7.5 In relation to the remaining options, we consider whether abolition or reform of the rule should be implemented with retrospective effect [paras. 5.3-5.7], and we provisionally conclude that legislation should be retrospective, subject to the restriction that it should not cause any person to be deprived of an interest which has already vested [para. 5.7 and para. 5.91]. Our intention is to achieve the greater simplification of perpetuity law which would be produced by retrospective legislation, but without interfering unjustly with vested interests. Comments are invited on our provisional conclusion.

7.6 Under Option 3 we discuss two possible rules which might be introduced in place of the rule against perpetuities:

(a) a rule limiting the duration of trusts; [paras. 5.50-5.55]

(b) a rule giving the courts a wide discretion to vary dispositions. [para. 5.56]

It appears to us that there would be serious practical difficulties and objections to the introduction of a new rule along either of these lines, and so we do not provisionally favour this option [para. 5.91].

7.7 Our provisional view, therefore, is that the choice is between recommending that the rule against perpetuities be abolished without replacement (Option 2), or that it be retained and reformed (Option 4). We have not at this stage formed a conclusion as to which of these options is preferable [para. 5.91].

7.8 In relation to the option of abolishing the rule we specifically invite comments on a number of questions:

(a) Do consultees have any evidence to indicate the extent to which, if the rule was abolished, contingent interests in property would be created which would last longer than the current perpetuity periods?

(b) Would such tying up of property for long periods be harmful or contrary to public policy?

(c) To what extent in practice would the other rules of law which we have identified in paras. 5.23-5.30 be effective in curbing excessive limitations?

(d) To what extent are consultees aware of steps being taken by disponors to avoid the rule?

7.9 Under Option 4 the following options are put forward for reforming the rule:

(a) removing the need under the 1964 Act to apply the common law before wait and see; [paras. 5.58-5.64]

(b) replacing the current perpetuity periods with a fixed period of years; [paras. 5.65-5.68]

(c) introducing a cy-près system whereby the court may reform dispositions which are void for perpetuity so as to comply with the rule; [paras. 5.69-5.78]

(d) making provision for advances in reproductive technology; [para. 5.79]

(e) creating new exceptions to the rule against perpetuities; [paras. 5.80-5.90]

The options are not mutually exclusive; for example, a cy-près system could be coupled with the exemption of commercial dispositions from the rule. Consultees are invited to comment

on each of these options and to indicate which they favour. As we indicated in para. 5.2 above we particularly invite comments on the economic and social aspects of our options. We would also welcome any other suggestions for reforms which we have not specifically considered.

B. THE RULE AGAINST EXCESSIVE ACCUMULATIONS

7.10 The present law relating to the rule against excessive accumulations is set out in Part III. In Part IV we analyse criticisms of the rule on the grounds of:

(a) complexity; [paras. 4.21-4.24]
(b) uncertainty; [paras. 4.25-4.28]
(c) inconsistency in its effect on dispositions; [paras. 4.29-4.30]
(d) frustrating the reasonable wishes of settlors; [paras. 4.31-4.34]
(e) applying to charitable trusts; [para. 4.35]
(f) not fitting well with other statutory provisions; [paras. 4.36-4.37].

7.11 We invite comments on the three alternative options we have presented in Part VI:

Option 1: to do nothing; [para. 6.3]

Option 2: to abolish the rule against excessive accumulations; [paras. 6.4-6.21]

Option 3: to reform the rule. [paras. 6.22-6.33].

7.12 As with the rule against perpetuities, we provisionally consider that the criticisms of the rule against excessive accumulations indicate a need for action to be taken, and so we reject Option 1. We have not at this stage made a choice between Options 2 and 3, but we again provisionally take the view that abolition or reform ought to be retrospective in effect, providing that any legislation did not deprive any person of a vested interest in property [para. 6.34]. However, we invite comments in relation to this question.

7.13 With regard to Option 2, we would welcome opinions on the following specific points:

(a) To what extent would settlors and testators direct longer accumulations of income if the rule was abolished?

(b) Do consultees believe that the accumulation of income for long periods would be socially or economically harmful?

(c) Would it be acceptable if settlors and testators were able to direct accumulations:

(i) for the duration of the perpetuity period; or
(ii) lasting indefinitely?

7.14 Under Option 3, the principal options which we consider for reforming the rule against excessive accumulations are as follows:

(a) changing the accumulation periods; [paras. 6.23-6.26]

(b) codifying all the relevant law in one statute; [para. 6.27]

(c) adding new exceptions to the rule; [paras. 6.28-6.30]

(d) extending wait and see to directions to accumulate; [para. 6.31]

We invite views on each of these possible reforms and on any other measures which we may have omitted to consider.

APPENDIX

List of Solicitors' Firms who Submitted Responses to a Questionnaire Distributed in 1991

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